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ACCIDENT AND CASUALTY
INSURANCE COMPANY OF
WINTERTHUR, SWITZER-
LAND, a corporation,
Appellant,

v.

NICHOLAS PIERRE, SIDNEY
J. PEERS, Administrator
of the Estate of William
Atley Peers, Deceased, and
ROBERT ECKERT, a minor,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

339 I.A. 51

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE
COURT.

On June 16, 1946 William Atley Peers, then seven years old, was drowned in a water-filled gravel pit on a ten-acre tract of land in Skokie, Illinois, owned by Nicholas Pierre, a contractor engaged in the business of excavating, grading and trucking. Shortly thereafter, on August 19, 1946, Robert Eckert, a minor two and one-half years old, was injured on the same property. Peers' administrator brought suit in the Circuit Court against the defendant Pierre to recover damages for the alleged wrongful death of the boy, claiming that the gravel pit was an attractive nuisance, and alleging that Pierre was negligent in allowing the place to remain unguarded, unenclosed and open and free of access to children in the neighborhood. The defendant Pierre requested plaintiff Accident and Casualty Insurance Company of Winterthur, Switzerland, to defend, and the insurance company, denying coverage under the policy which it had issued to defendant Pierre, defended under a non-waiver agreement. Subsequently the company brought an action in equity under section 57-1/2 of the Civil Practice

Act (Ill. Rev. Stat. 1947, ch. 110, sec. 181.1) for a declaratory decree that the liability, if any, of the defendant Pierre to Peers as administrator and to Robert Eckert was not within the coverage provisions of plaintiff's policy. Following the entry of the decree in the trial court in the present case, the wrongful death action was tried in the Circuit Court, resulting in a verdict for the defendant contractor Pierre. Thereupon plaintiff appealed from that judgment, which was affirmed in Peers, Adm., etc. v. Pierre, 336 Ill. App. 134, the court being of the opinion that the gravel pit did not come within the doctrine of an attractive nuisance. The Eckert claim was adjusted in the Probate Court. These two matters having been finally disposed of, there remains nothing in this proceeding except the question whether the plaintiff insurance company is liable for suit money and costs. The chancellor who tried the instant proceeding for a declaratory judgment found the issues in favor of defendant Nicholas Pierre and against the insurance company, and decreed that the policy covered, within the limits of liability therein specified, the liability of Pierre arising out of the occurrences complained of.

A recital of some of the salient facts, none of which were in dispute, is essential to an understanding of the question presented. Nicholas Pierre conducted his business of excavating, grading and trucking from 4341 Simpson street, Skokie, Illinois, which was both his home and his place of business. He had a couple of garages at this address, stored some equipment there, and had his office in

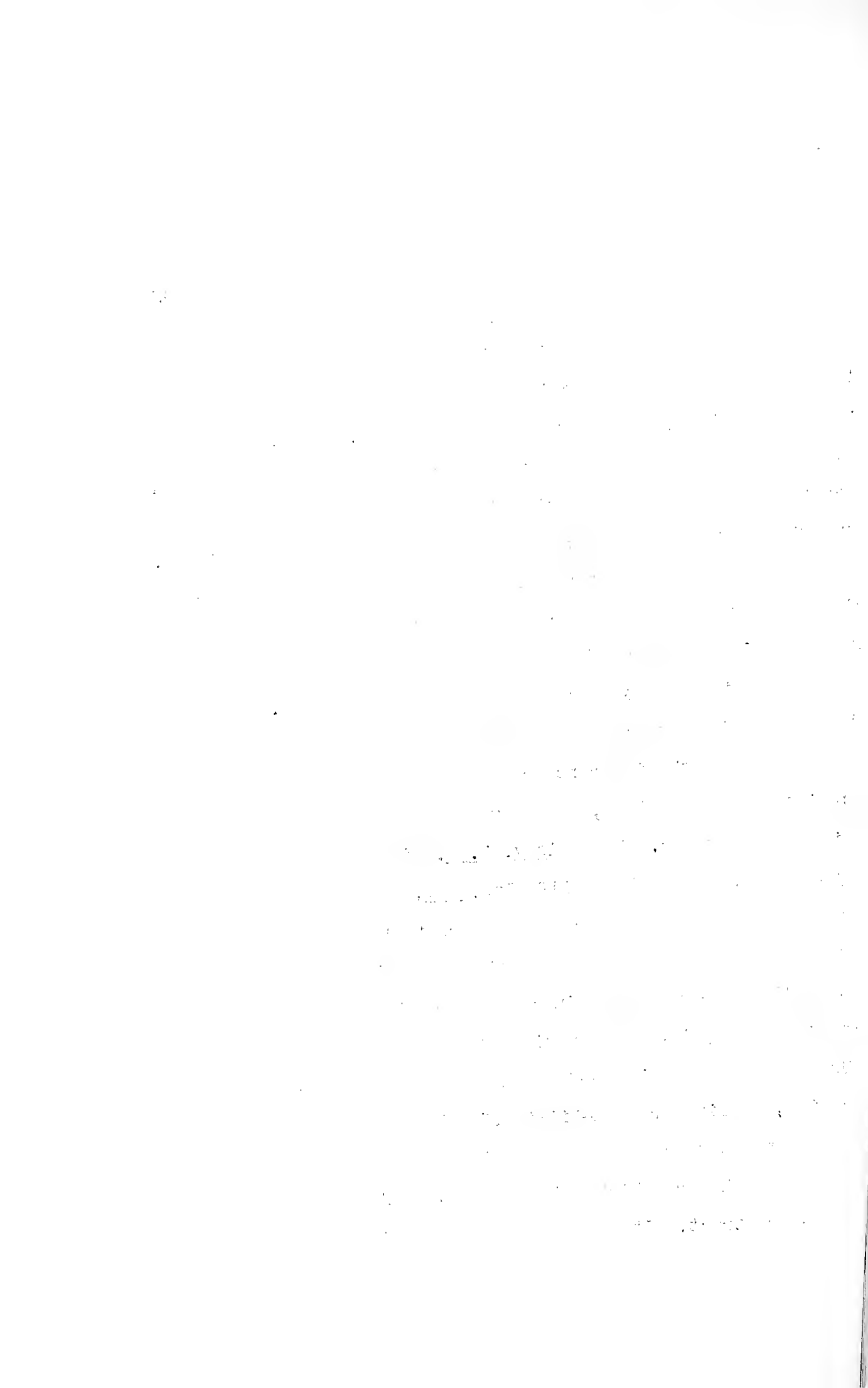
his home. About a mile from his home Pierre also owned a ten-acre tract; a house, a barn and a couple of frame buildings were located on this property. The house was occupied by Pierre's tenant. The property also contained the sand or gravel pit in which Peers was drowned and Eckert injured. On this tract Pierre kept certain equipment for taking sand and gravel from the pit which he used in connection with his business as a contractor. A number of men were employed on the premises, loading and hauling gravel.

Effective February 14, 1946 and for the period of one year following, the plaintiff issued to defendant Nicholas Pierre its liability policy No. MC 20933, covering defendant's bodily-injury liability against the hazards of premise operations and contractual undertakings to the extent of \$10,000.00 for each person and \$20,000.00 for each accident. In the Declarations, made a part of the policy, it is stated that the address of defendant Pierre was 4341 Simpson street, Skokie, Illinois, and that the "Location of all Buildings, Yards, Premises and Work Places constituting the Insured's permanent locations" is at the same address. It also provided, under the exclusion clauses, that the policy did not apply "to operations on or from other premises owned, rented or controlled by the Insured." The gravamen of plaintiff's contention is that under the exclusion clause the policy does not apply to operations on or from other premises owned, rented or controlled by the insured unless such premises are listed as such in the Declarations and the premium charges are adjusted accordingly. Its counsel argue that the ten-acre



tract was not a part of the insured's permanent location, but was approximately a mile distant therefrom; that it is not described or set up in the Declarations attached to the policy or in the policy itself or by any endorsement thereto as one of the insured's permanent locations; and therefore it is said that a reasonable construction of the statement contained in the Declarations, "Location of all Buildings, Yards, Premises and Work Places constituting the Insured's permanent locations," excludes from the coverage the liability of the insured arising out of the ownership, maintenance or use of the ten-acre tract.

The controversy centers around the function of exclusion clauses in the policy and various decisions are cited by plaintiff to support its contention that the exclusion clause was improperly disregarded by the chancellor. Plaintiff argues for a narrow construction of the policy. Contracts are prepared by the insurance company, and under the rule often enunciated in this state, ambiguous words or terms are construed against the insurer. Lenkatis v. N. Y. Life Ins. Co., 374 Ill. 136; James v. Metropolitan Life Ins. Co., 331 Ill. App. 285. From the undisputed evidence it appears that defendant caused certain gravel and dirt to be trucked from the property situated on the ten-acre tract in connection with his business. We think this work, labor and equipment were within the "Purposes of Use ***Grading of Land--Not Otherwise Classified-- Including Borrowing, Filling or Back-Filling." The accidents to the two boys were not caused by the ownership of the property but resulted from a hazard which existed because of the operation of the ten-acre tract. It seems to us to be a fair interpretation



of the policy that it was intended to cover work and operations of that kind on the ten-acre tract.

The chancellor evidently resolved the controversy upon the theory that the accident actually arose out of the operation, and that ownership of the ten-acre tract was incidental. We agree with his conclusions, and accordingly the decree of the Superior Court is affirmed.

Decree affirmed.

Sullivan, P. J., and Scanlan, J., concur.

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44577

ARCO ELECTRONICS, INCORPORATED,)
a corporation,)
Appellee,) APPEAL FROM CIRCUIT
v.) COURT, COOK COUNTY.
PRODUCT MANUFACTURING & ENGINEER-)
ING CORPORATION, a corporation,)
Appellant.)

339 I.A. 521

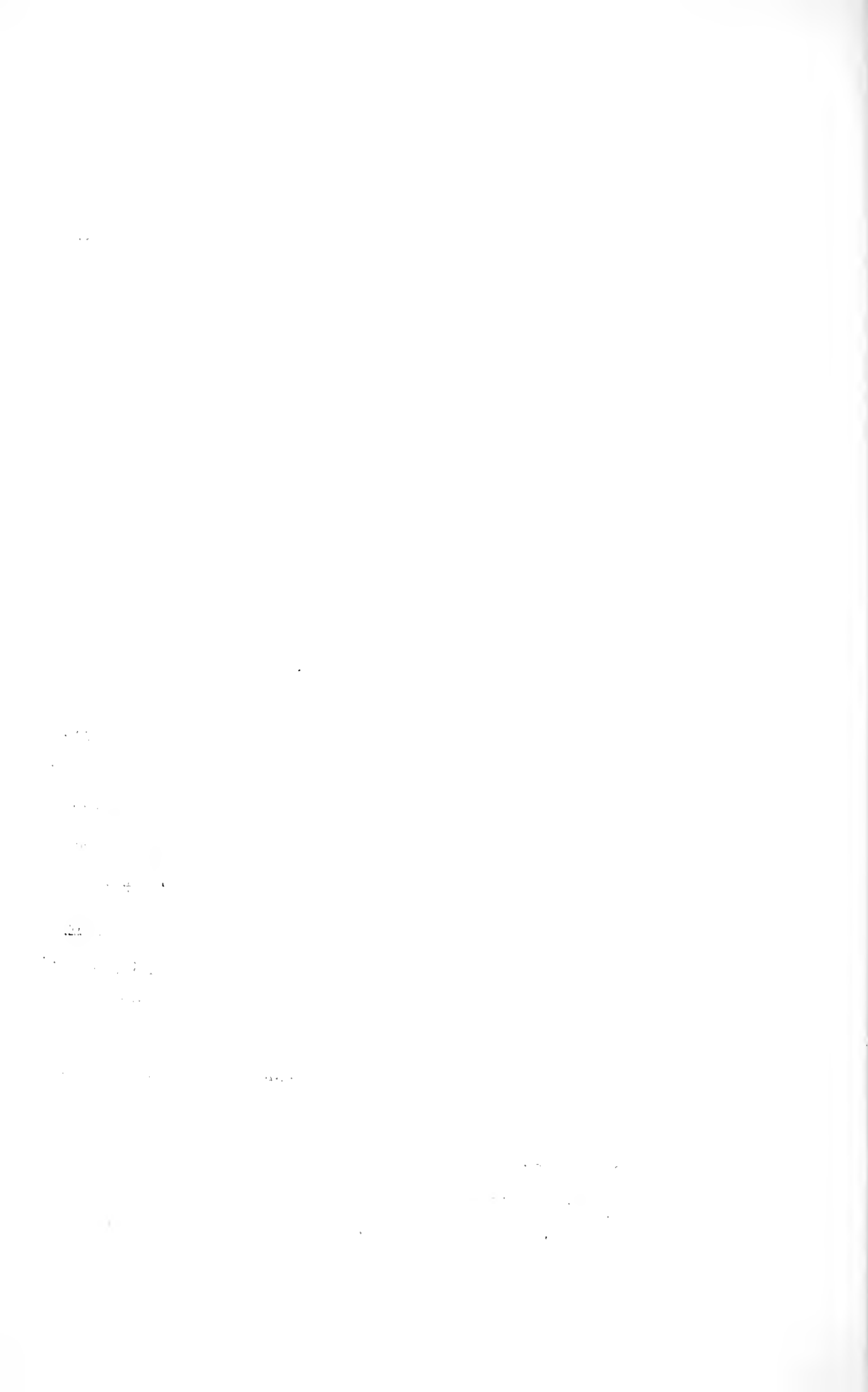
MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Plaintiff brought suit to recover the balance of a cash payment made to defendant under the terms of a written agreement dated March 20, 1946, and supplemented by written memorandum of September 19, 1946. A jury was impanelled, and at the close of all the evidence plaintiff's motion to instruct the jury to return a verdict finding the issues in its favor and assessing damages in the sum of \$21,326.40 was allowed, and judgment was entered accordingly. Defendant appeals.

It appears that on March 20, 1946 the parties entered into a written contract wherein defendant agreed to manufacture and ship, and plaintiff agreed to purchase, 200,000 phonograph motor and turntable units. As a deposit against this contract plaintiff delivered to defendant the sum of \$25,000.00 in cash. The purchase price of these units as provided by the contract was the price to be fixed in the future by the Office of Price Administration, which "should be approximately One and 75/100 (\$1.75) Dollars per unit." The contract and supplement thereto called for a schedule of delivery of the units which defendant utterly failed to attain, only 1792 units

having been delivered up to the time plaintiff rescinded the contract late in November 1946. After the supplemental agreement was entered into defendant advised plaintiff that it had units ready to deliver. Plaintiff requested shipment, but because of a dispute as to the unit price no shipment was made, and finally plaintiff rescinded the contract and brought suit to recover the balance due from its \$25,000.00 deposit.

The principal ground urged for reversal is that the court committed reversible error in directing a verdict for plaintiff at the close of all the evidence and giving the jury a mandatory instruction to assess plaintiff's damages at \$21,326.40. It is argued that there were several vital issues of fact which should have been submitted to the jury, and that the court invaded the province of the jury by determining these facts and computing the balance to which plaintiff was entitled from the \$25,000.00 deposit. Defendant's breach of the contract of sale was not made an issue of fact at the trial. Defendant concedes in its brief that "the crux of the matter was the price per unit" for the purpose of determining the credit to which defendant was entitled for the 1792 units theretofore shipped. There was no other controverted issue. Plaintiff does not make any claim for damages; it merely sought to recover a refund of the balance of its cash deposit. With respect to price, the applicable provisions of the contract are as follows: "The price of each unit is to be determined at



a later date and both the Purchaser and Seller agree to accept whatever ceiling price per unit is determined by the Office of Price Administration, which price should be approximately One and 75/100 (\$1.75) Dollars per unit. In the event that the Office of Price Administration fails to fix a ceiling price or in the event that that agency is abolished, the price of the units is to be settled by negotiation between the parties hereto." It was not until November 13, 1946 that defendant finally mailed plaintiff the complete pricing decision made by the Office of Price Administration which indicated the maximum prices chargeable to three different classifications of traders, namely, \$2.05, \$3.48 and \$7.74. The failure or refusal of defendant to ship units which were ready for shipment may be ascribed to the fact that defendant demanded the price fixed in one of the classifications, namely, \$3.48 per unit. Under the stipulated contract price of "approximately One and 75/100 (\$1.75) Dollars per unit," plaintiff would have been required to pay for 200,000 units the sum of \$350,000.00. Under the price of \$3.48 which defendant demanded, plaintiff would have been required to pay for the same number of units the sum of \$696,000.00, or an additional \$346,000.00. The Office of Price Administration fixed the price of \$2.05 for manufacturers and the higher price of \$3.48 for jobbers or dealers, and it was defendant's contention that the status of plaintiff should be the determinative factor in interpreting the OPA directive. Defendant's testimony tended to prove that plaintiff was not a manufacturer,



whereas on the other hand plaintiff introduced evidence to the contrary. It is urged that the status of plaintiff and the relationship of the parties thus became issues of fact for the jury as they related to the OPA fixed prices. However, whether or not plaintiff was a jobber or manufacturer is of secondary importance because the price fixed by the parties was "approximately One and 75/100 (\$1.75) Dollars per unit." The OPA pricing order thus became persuasive only to the point where \$2.05 was the closest price to \$1.75; the sole purpose in relying on the OPA prices was because they were set to fix a legal maximum. There was nothing in OPA regulations to prevent defendant from selling at a lesser price, and the ultimate rights of the parties must be found in the contract. Since they had stipulated the price to be approximately \$1.75, we think it was entirely proper for the court to accept the closest price to \$1.75 designated in the OPA price-fixing order, which was \$2.05. This gave defendant approximately 30 cents more per unit than it had originally asked for. Under the provisions of the contract it would have been absurd to expect plaintiff to pay substantially twice as much for the units as it had agreed to do. In Bloomington Canning Co. v. Union Can Co., 94 Ill. App. 62, the court held that the word "approximately" is susceptible of reasonably specific meaning. It was the duty of the court to interpret the provisions of the contract, and in adopting the nearest maximum price fixed by the OPA, i.e., \$2.05, the court committed no error.

The arithmetical calculation made by the court of which defendant complains, followed as a matter of course. Multiplying 1792 units which had been delivered by defendant at \$2.05 each, the court arrived at the figure of \$3673.60. Deducting that amount from \$25,000.00 which plaintiff had deposited, left the difference of \$21,326.40, for which the jury was directed to return a verdict in favor of plaintiff. Under the circumstances we think the court properly resolved the only controversial issue by a judicial interpretation of the contract and directed a verdict in accordance with the only balance which arithmetical calculation could produce.

The judgment of the Circuit Court is therefore approved.

Judgment approved.

Scanlan and Sullivan, JJ., concur.



43997

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. RUSCH,

Appellee,

v.

THERESA PARTIPILO, EMILY AMADEI,
BETTY STANLEY, GRACE TORTORELLO
and MARY DEL CONTE,

Appellants.

APPEAL FROM COUNTY

COURT OF COOK

COUNTY.

333 I.A. 52²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE
COURT.

An order was entered in the County court of Cook
county granting John S. Rusch, Chief Clerk of the Board
of Election Commissioners of the City of Chicago, leave
to file the following verified petition:

"2. That on the 3rd day of June, 1946, an election
was held in the City of Chicago, County and State as afore-
said, for the election of judges of the Circuit and
Superior Courts of Cook County, and also for certain
propositions that were submitted to the electorate at
said election.

"3. That at and during said election the following
named persons hereinafter called the respondents, served
in the election precinct known as the 37th precinct of the
26th ward of said city of Chicago, as judges and clerks of
election, as indicated opposite their names, respectively,
towit:

"Theresa Partipilo
Emily Amadei
Betty Stanley
Grace Tortorello
Mary DelConte

Republican Judge
Republican Judge
Democratic Judge
Republican Clerk
Democratic Clerk

"4. That at and during said election each of the

1. The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present and for the development of a sound policy for the future. The author points out that the study of history is not only a means of satisfying a natural curiosity about the past, but also a means of developing a sense of responsibility for the future.

2. The second part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present and for the development of a sound policy for the future. The author points out that the study of history is not only a means of satisfying a natural curiosity about the past, but also a means of developing a sense of responsibility for the future.

3. The third part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present and for the development of a sound policy for the future. The author points out that the study of history is not only a means of satisfying a natural curiosity about the past, but also a means of developing a sense of responsibility for the future.

said respondents who served at said election misconducted and misbehaved himself as such judge or clerk of election, as more fully hereinafter appears, and that, as to each of said respondents, his misconduct and misbehavior constituted, as your petitioner is advised, informed and believes, a contempt or contempts of this Honorable Court, said respondents being officers of the County Court.

"5. That petitioner is informed and believes that said respondents permitted applications to be presented and filed and ballots to be cast in the names of persons who did not personally appear at the polling place and vote in said June 3rd, 1946, election; permitted applications containing the forged signatures of voters to be presented and filed and ballots cast in the names of the same; made a false canvass and return of the votes cast.

"Wherefore your petitioner respectfully prays that an order and rule may be entered by this Honorable Court against each of aforesaid respondents, commanding him to be and appear in this court at a time to be designated in said order, then and there to show cause, if any he can, why he, as an officer of said court, should not be adjudged guilty of a contempt or contempts of this court for misconduct and misbehavior in office, and on account of the matters and things hereinbefore alleged."

Respondents were ruled to show cause why they should not be adjudged guilty of contempt and punished for contempt, and writs of attachment were ordered issued against them. After a hearing upon the petition and answers the



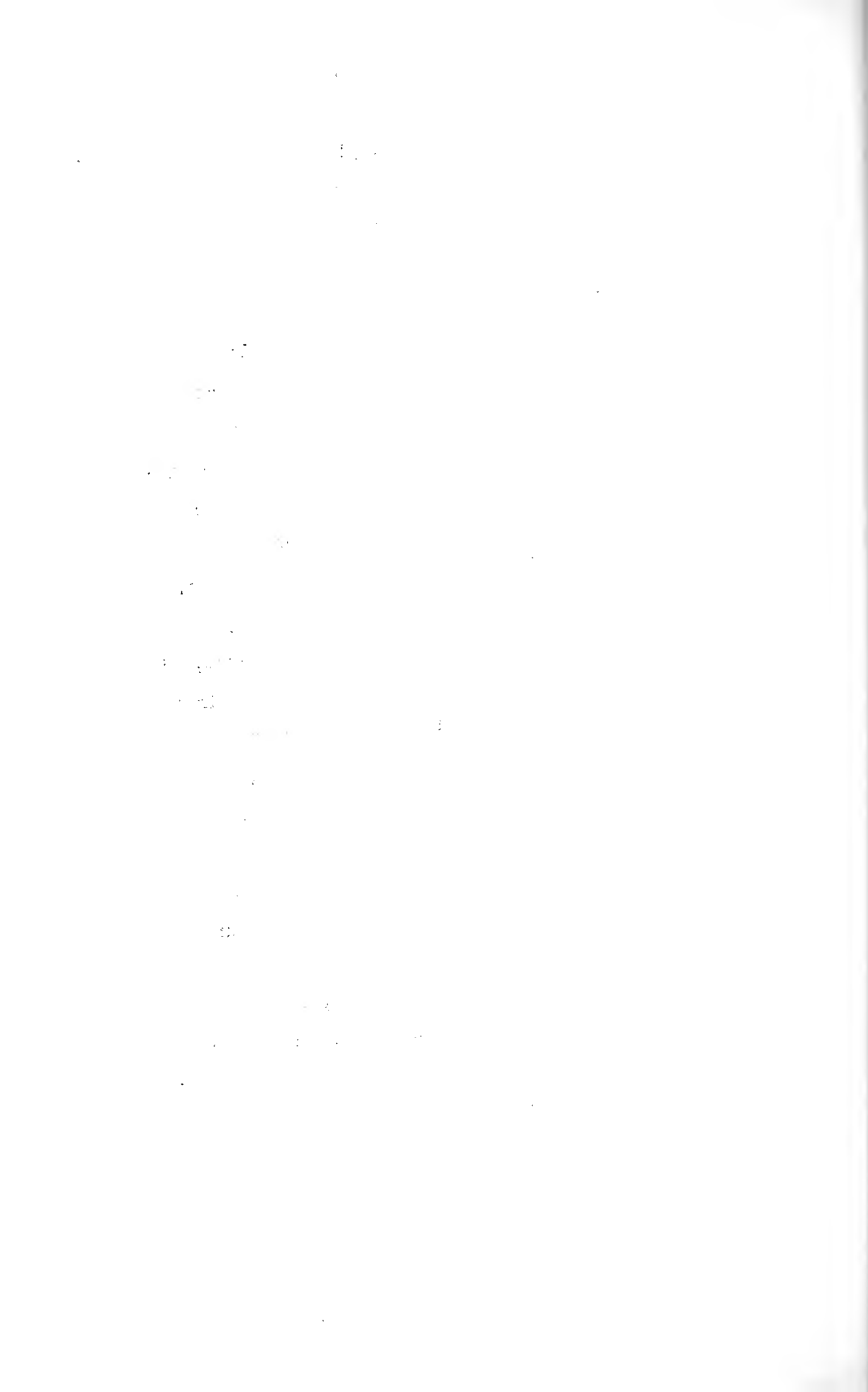
following judgment order was entered:

"This matter coming on to be heard on the verified petition filed herein and the oral plea of 'Not Guilty' of the respondents, the Court having heard the testimony of witnesses, and the respondents having testified in their own behalf, and having examined all of the evidence and having heard the arguments of counsel, FINDS:

"That Theresa Partipilo served as Republican Judge, Emily Amadei served as Republican Judge, Grace Tortorello served as Republican Clerk, Betty Stanley served as Democratic Judge and Mary Del Conte served as Democratic Clerk at the Elections held June 3, 1946, and as such were officers of the County Court of Cook County:

"THE COURT FURTHER FINDS, that the respondents, Theresa Partipilo, Emily Amadei, Grace Tortorello, Betty Stanley and Mary Del Conte were guilty of misconduct, misbehavior in office as officers of the County Court in the conduct of the elections held June 3, 1946, in the 37th Precinct of the 26th Ward of the City of Chicago, County of Cook, Illinois; and the County Court further finds, that the said respondents because of such misconduct and misbehavior in office as election officials of said precinct and ward, are guilty of contempt of the County Court of Cook County;

"IT IS ORDERED, that the respondents, Theresa Partipilo, Grace Tortorello and Mary Del Conte be fined in the sum of Fifty Dollars (\$50.00) each, and that each pay said fine to the Clerk of this Court instanter, and the



failure or refusal of each to pay said fine, each of said respondents stands committed to the County Jail of Cook County until said fine is paid or satisfied by allowance of the sum of Two Dollars and Fifty Cents (\$2.50) for each day each respondent stands committed.

IT IS FURTHER ORDERED, that the respondents Emily Amadei and Betty Stanley be committed to the County Jail for a period of three (3) months each;

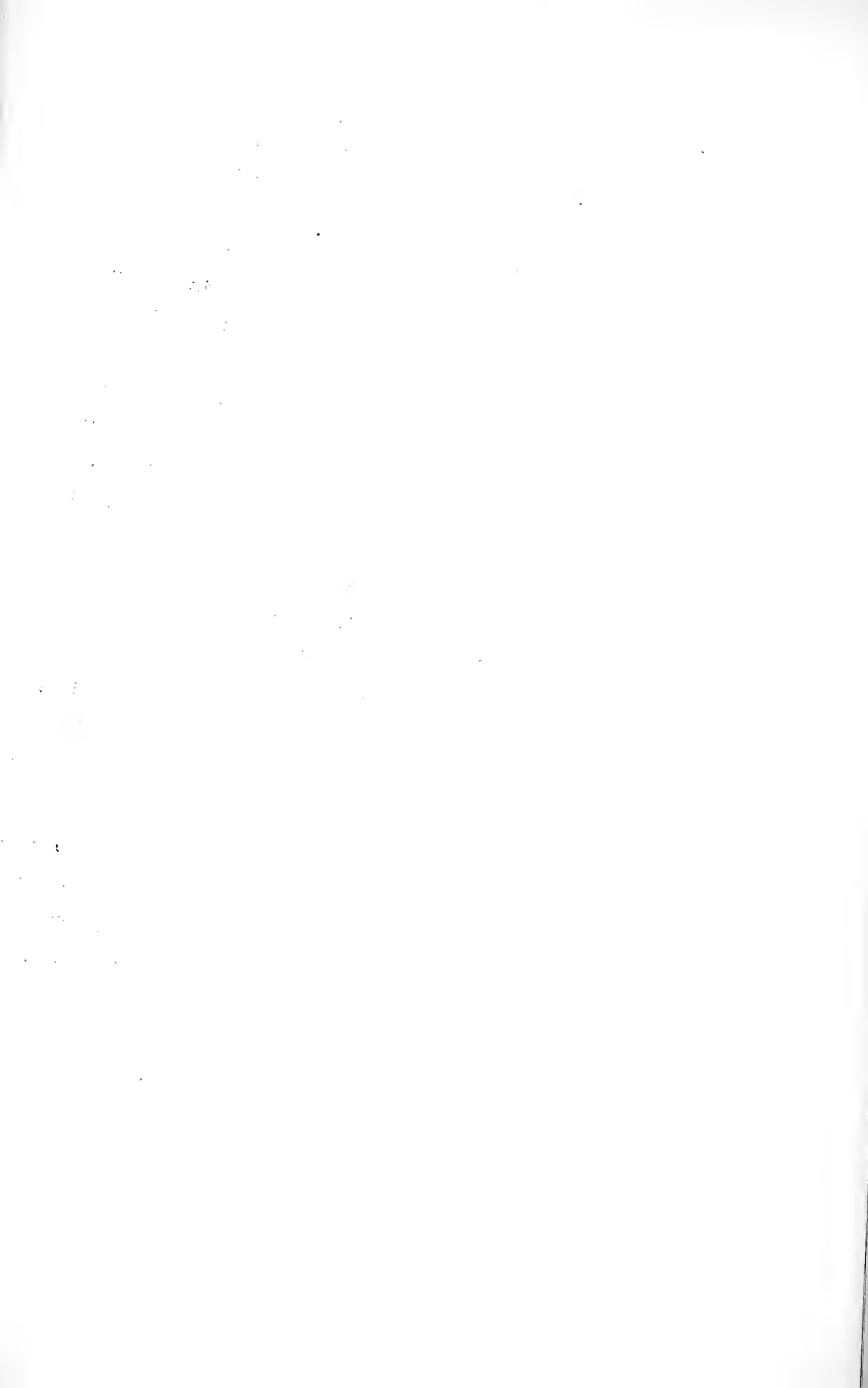
"IT IS FURTHER ORDERED, that the Sheriff of Cook County take into custody the respondents, Emily Amadei and Betty Stanley and to hold the said respondents, Emily Amadei and Betty Stanley safe in his custody in the County Jail for a period of three (3) months, unless otherwise discharged by law."

Respondents appeal.

Respondents concede that applications for ballots filed in the precinct were not genuine but they claim that they had no knowledge or means of knowledge whereby they could have known or should have known that such applications were not genuine, and deny that they are in any manner guilty of any of the charges against them or responsible, therefore, by act or omission, for the presence of the spurious applications, and they contend that petitioner failed to present any convincing evidence that any of respondents committed any wrongful act or had any knowledge or means of knowledge of the commission of any wrongful act. Respondent Amadei had served as a judge of election for eight years; respondent Stanley had been a



judge of election four times prior to the election in question; respondent Tortorello had been a clerk of election at an election held four years prior to the one in question; respondent Del Conte was serving as an election official for the first time, and respondent Partipilo was sworn in as a substitute judge at 10 A.M. There were no political workers nor watchers in the polling place during the day. It is undisputed that respondents were in exclusive control of the election machinery during the entire day and were not hampered by anyone in the performance of their duties. There were 212 applications for ballots signed during the day. Rudolph B. Salmon, an expert examiner of disputed documents, who testified for petitioner, stated that he examined all of the applications for ballots and compared the signature on each application with the signature of the voter in the binder and that he was of the opinion that the signatures appearing upon the following forty applications, numbers 61, 62, 64, 65, 66, 70, 82, 83, 98, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 156, 157, 158, 159, 160, 161, 163, 165, 171, 179, 180, 181, 182, 192, 193, 194, 195, 196, 197 and 198, were not written by the same persons who signed the binder cards of the corresponding names; that application cards 179, 181, 182, 192, 193, 194, 195 and 196 were written by one person; that application cards 156, 158, 161, 163, 165 and 180 were written by one person; that application cards 117, 118, 119, 121, 123 and 124 were written by one person; that application cards 116, 122, 125 and 157 were written by



one person, and that application cards 120, 159, 160, 197 and 198 were written by one person. Petitioner contended at the trial that the forty forged signatures on the application cards were so dissimilar to the signatures of the voters on the registration cards that it required no handwriting expert to determine that they were forgeries. In People ex rel. Rusch v. Verdon, 335 Ill. App. 616, we stated (p. 623):

"The instant proceeding is a civil contempt and it is sufficient if the guilt of respondents be established by a preponderance of the evidence. (See People v. Fusco, 397 Ill. 468, 470.) The guilt of respondents may be proven by direct or circumstantial evidence, and in cases of this kind circumstantial evidence is generally the only evidence that can be produced. We deem it necessary to refer only to certain mountain peaks in the evidence. The proof shows that in group 3 of the applications, 42 of the applications were written by one person, and from this proof we must conclude that one person appeared before the election officials 42 times and that upon each occasion he made application to vote in the name of a registered voter; that each time he was handed an application, and, after he had signed it, was permitted to vote in the name of the registered voter. One person, therefore, impersonated 42 registered voters. What we have just stated applies also to the person who voted 12 times, and to the person who voted 17 times. The claim of all of the respondents that they saw nothing happen during the voting that apprised

them that unlawful voting was taking place is destroyed by the proof."

A similar situation as to "repeaters" is present in the instant case. In fact, respondents, in their brief, state that the evidence introduced against them is similar in every respect to the evidence introduced in the Verdon case, supra. In the instant case one person voted eight times, two persons voted six times each, one person voted five times, and still another, four times. It is significant also that in the instant case, like in the Verdon case, there were no watchers present during the election. The election precinct in the instant case adjoins the election precinct in the Verdon case. The uncontradicted evidence is that respondents were in exclusive control of the election machinery and that neither political workers, watchers nor outsiders interfered in any way with that control. The argument of respondents amounts to this: that even if the evidence proves the guilt of one or more of the respondents, still, before you can find any one of the respondents guilty you must find that that respondent committed a wrongful act or had knowledge or means of knowledge of the commission of the wrongful act. While that statement of the law is correct, it is also the law that the guilt of a respondent may be proved by direct or circumstantial evidence. As to the respondents who were judges of election the trial court was justified in finding that they actively aided the conspirators to cast fraudulent votes at the election. As to the clerks of election the trial court was justified in

finding that they closed their eyes to the unlawful voting by repeaters, made no effort to prevent it, and that by their conduct they became, in the eyes of the law, parties to the conspiracy. (See People ex rel. Rusch v. Verdon, supra, p. 623.) We are satisfied that the evidence fully justifies the findings of the trial court. In reaching this conclusion we have considered the fact that respondents proved good reputations, denied that they were guilty of the charges made against them, and stated that they had no interest in the election.

Respondents contend that the punishment inflicted is grossly excessive. What we said upon a similar point made in People ex rel. Rusch v. Verdon, supra, p. 624, is applicable here.

Respondents lastly contend that the judgment order finding them guilty is void because of its failure to recite that respondents were present in open court at the time of its entry. In the Verdon case, supra, we stated (p. 624):

"We find no merit in the remaining contention of respondents, that the judgment order is fatally defective and void because it fails to recite that respondents were present in open court at the time of its entry. The instant proceeding is a civil proceeding and is governed by civil procedure. (See People v. Fusco, supra, p. 473.)"

The judgment order of the County court of Cook county should be and it is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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Abstract

[Faint, mostly illegible text body consisting of several paragraphs]

he had a good chance for some of his kin folks to make some money in oil and gas and he would like to let him in on some leases. The plaintiff Adkins said he knew nothing about the business and that if he gave up any money it would be because "I am trusting you to be treating me square about it"; to which Evans replied "you don't think I would try to flim-flam my own relations do you". Adkins then said "I don't think you would * * * but I don't know, but anyway I will trust you."

The conversation led to the purported selling by Evans to Adkins of a purported assignment of portions of some oil and gas leases that he claimed to own in Harrison County, Indiana, for the sum of One Thousand Dollars paid by check executed by Adkins and delivered to and cashed by Evans. Evans in the conversation represented that in a few weeks he would start drilling on the land upon which he held leases, which would protect Adkins from losing any money, as part of the leases could then be sold.

The defendant Evans produced an assignment of leases which he claimed his wife, Luda Evans, had signed in blank, and by referring to a map and several papers that he extracted from his brief case, filled in the descriptions in the purported assignment which was delivered to plaintiff, and which was in words and figures as follows:

"ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS: That I, C. G. Evans and Luda Evans (wife) for One Dollar and other valuable considerations, the receipt of which is hereby acknowledged, have sold and by these presents do hereby sell, assign, transfer and set over to heirs and assigns all interest in all of the acres described in that certain Oil and Gas Lease made and executed by C. G. Evans in favor of

Frank L. Adkins dated 19....., recorded in Book
....., Page, in so far as said lease covers the following
described land, to-wit: S.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ containing 40 A. Sec. 36 Twp. 2.
R. 2 H. C. Rulican N.W. $\frac{1}{4}$ N.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ T. 2 R. 2. Sec. 25 containing
40 A. C. B. Moser. N.W. $\frac{1}{4}$ N.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ containing 20 A. Sec. 36 - T. 2
R. 2. also N.E. $\frac{1}{4}$ N.E. $\frac{1}{4}$ containing 21. Sec. 37 - T.2 R. 2. F. Briscoe.
N.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ Sec. 26 T. 2 R. 2 containing 40 A. G. W. Boldt. N.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of
N.E. $\frac{1}{4}$ Sec. 35 containing 40 A. W. D. Lincoln, and situated in the Township
of Spencer County of Harrison and State of Ind., the said Frank L. Adkins
heirs or assigns, to have, own and hold the said lease
forever, subject, however, to the terms and conditions of the said lease,
and hereby transferring all dower and homestead rights.....

IN WITNESS WHEREOF, I have hereunto set my hand and seal, the 22 day
of June 1940.

C. G. EVANS (SEAL)

WitnessLUDA EVANS.....

=====

STATE OF ILLINOIS)
) SS
County of Bond)

I, Gladys Mettles, a Notary public in and for said County and State, do
hereby certify that C. G. Evans and Luda Evans, his wife personally known to
me to be the same persons whose names subscribed to the foregoing
instrument, appeared before me this day in person and acknowledged that
they signed, sealed and delivered said instrument as their free and voluntary
act, for the uses and purposes therein set forth, including the release and

for the use and purchase therein set forth, including the name and
they signed, sealed and delivered said instrument as their true and voluntary
instrument, appearing before me in person and acknowledged to me that they
me to be the same; and on the day and date above written I caused to be
duly certified that G. W. and Mrs. Dora W. are the persons who to
City of New York, New York, this 10th day of June, 1940.

Witness my hand and the seal of said City of New York, this 10th day of June, 1940.

Notary Public in and for the City and County of New York.

waiver of the rights of dower and homestead.

Given under my hand and Notarial seal, this 12th day of April A.D. 1940.

Gladys Mettles Notary Public

Post Office Address Greenville, Illinois

My commission expires 2/27/1944.

(NOTARIAL SEAL)

After this visit the defendant Evans never again called at the plaintiff's home, and it is admitted that he never drilled for oil or gas on any of the leases in Harrison County, Indiana. Plaintiff wrote the defendant Evans on two occasions, one of which letters was answered by defendant's daughter. About a year later plaintiff called upon the defendant at his home in Greenfield, Illinois, relative to the transaction, but the record fails to disclose what took place at that meeting further than Evans testified that Adkins said something about having a chance to sell the assignment and he, Evans, advised him to sell only part of the leases and hold the rest. Adkins denied this conversation and testified that he never had an opportunity to sell his interest and never told Evans of any such opportunity.

Adkins went to Corydon, the county seat of Harrison County, Indiana, and "attempted" to locate oil and gas leases that Evans may have taken out and was unable to do so. It is not disclosed what action he took in attempting to locate the leases. Adkins testified that he never received any property or money as a result of the assignment.

James P. Murphy, an engineer, testified on behalf of the plaintiff that he could not accurately locate any of the property described in the

assignment, principally because there is no reference to a principal meridian and because no direction is given from a meridian, and the acreage is not accurately described, although the names of land owners mentioned in the description would aid in locating those parcels mentioned in connection with these names.

M. P. O'Brien, also an engineer and surveyor, testified on behalf of the defendants that he could definitely locate the land described in the assignment with the exception of that land described in Section 37, there being no Section 37 known in land surveying profession.

The defendant seeks to set aside the judgment on the grounds that the same is contrary to the manifest weight of the evidence. With this contention we cannot agree. The purported assignment falls far short of assigning any right or title to the plaintiff in anything. On the contrary, it recites that C. G. Evans and Luda Evans, his wife, transferred and assigned to an unnamed assignee certain interest in leases made and executed by C. G. Evans to Frank L. Adkins. It then proceeded with incomplete and uncertain descriptions of certain acreage in Harrison County, Indiana, some of which it is admitted could not be located. No leases were offered in evidence, and no documentary proof of the recordation of any such leases was produced. It is quite clear that the plaintiff received nothing for his money. The document given the plaintiff at the time he paid the \$1000.00 was of no value from the time it was drawn and delivered. No other consideration is evident nor any suggested, and the plaintiff should recover the money he paid to defendant.

Plaintiff brought the proper action in this case. The action of assumpsit is maintainable in all cases where one person has received money under such circumstances that in equity and good conscience he ought not

[illegible]

being on section 37 and I had a private conversation with the president of the board of directors, Mr. J. J. O'Brien, also in connection with the same. The defendant's wife was present at the time of the defendant's arrest and was in the room with the president of the board of directors, Mr. J. J. O'Brien, when the defendant was arrested.

[illegible]

under such circumstances that in equity and good conscience he should not be required to maintain the same. It is respectfully suggested that the court should not maintain the same. It is respectfully suggested that the court should not maintain the same.

to retain. The Board of Highway Commissioners v. The City of Bloomington, 253 Ill. 164; Indiana Harbor Belt Railroad Company v. The City of Calumet City, 391 Ill. 280.

This case was tried by the court without a jury. The court heard and saw the witnesses and was in a better position to pass upon the credibility and the weight to be given their testimony than is this court in review. We cannot say that the court's finding is contrary to the manifest weight of the evidence. Therefore it is our conclusion that the judgment of the trial court should be and is affirmed.

Judgment affirmed.

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A.D. 1949

General No. 9861

Agenda No. 6

In the Matter of the Estate of)
Sarah Dobbins, deceased.)
)
O. C. Carlen,)
Plaintiff-Appellee,)
vs.)
Jerry E. Hopkins, Administrator)
of the Estate of Sarah Dobbins,)
deceased,)
Defendant-Appellant.)

339 I.A. 23²

Appeal from
Circuit Court of
Cumberland County.

DADY, J.

On May 27, 1947, O. C. Carlen, plaintiff-appellee, filed his claim in the County Court of Cumberland County against the estate of Sarah Dobbins, deceased.

The itemized claim stated that it was for \$1750 for 1750 nights lodging and breakfasts, \$110 for eleven weeks of care in the home of the claimant while the deceased was ill, \$100 for fifty days labor on the farm of the deceased in hauling wood and \$200 for expenses and inconvenience caused by the death of deceased in the home of the claimant.

The County Court allowed said claim in the sum of \$400 as a fourth class claim, and \$1,000 as a seventh class claim.

Approved

7-11-64

San Jose, Costa Rica

DATE OF RETURN

Figure 1

In the matter of the Estate of
Baron Hobbie, deceased.

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deceased; before the death of
of the estate of which deceased
JERRY C. HOPKINS, Trustee.

• 7, YOUNG

On May 27, 1964, the U.S. Coast Guard cutter USCGC Spencer (WMEC-905) was underway in the vicinity of the mouth of the Mississippi River, en route to the Gulf of Mexico. The cutter was on a patrol mission and was operating in the Gulf of Mexico. The cutter was on a patrol mission and was operating in the Gulf of Mexico. The cutter was on a patrol mission and was operating in the Gulf of Mexico.

The deceased claimant resided at [redacted] nights lodging and subsistence, in [redacted] in the home of his claimants during the [redacted] For fifty days prior to his death he was [redacted] and \$800. for expenses and maintenance due to the death of [redacted] deceased in the name of the claimant.

The County Court allowed him in the sum of \$700 as a fourth class claim, and \$1,000 as a seventh class claim.

On appeal by the estate the Circuit Court heard the case without a jury and allowed the claim in the sum of \$1,000 as a seventh class claim.

The case is before us on appeal by the estate.

The undisputed facts show that the decedent died in the home of the claimant on December 3, 1946, and her funeral was held in such home.

At the time of her death and apparently during all of the times in question she was a widow, and at the time of her death was aged 80 years and 5 months.

The claimant was a farmer and lived with his wife on his farm. The decedent owned an adjoining farm, her home being about 30 rods distant from the home of claimant. During the period in question the decedent apparently lived alone in her home.

There was no relationship between the claimant and the decedent.

The only issues are as to whether the claimant by competent evidence proved the services claimed to have been performed by him, and whether the claimant by competent evidence proved that the value of such services was at least \$1,000.

The only evidence admitted or offered on the issues in question was that of the witnesses for the claimant.

At the conclusion of claimant's evidence the administrator moved that the claim be dismissed. The court denied such motion.

The evidence shows that during the last five years of her life the decedent slept a great many nights at the home of the claimant, and on the following mornings had her breakfasts at such home.

On appeal by the State the circuit court of the
a jury and returned a verdict of guilty.
class claim.

The case is before the court on appeal.
The undersigned judge of the circuit court of the
home of the defendant in the case.
held in the case.

At the time of the trial the defendant was
in question the case was heard by the court
to years and 3 months.

The circuit court of the State of Missouri
The defendant moved for a new trial.
The circuit court of the State of Missouri
question the case was heard by the court.

There was no evidence in the case.
The only issue was the case.
evidence proved the case.
and whether the case was heard by the court
of such evidence was the case.

The only issue was the case.
was that of the case for the case.

At the time of the trial the defendant was
that the case was heard by the court.
The evidence showed the case was heard by the court.
The defendant moved for a new trial.
and on the case was heard by the court.

Mrs. Sims, a daughter of the claimant testified that during the last five years of her life the decedent slept and had breakfast on about 1750 occasions at such home. On cross examination it was brought out that during such five years Mrs. Sims was married and lived with her husband in Charleston, and was not at the claimant's home every night. However, her home in Charleston was only about 10 or 15 miles distant from the home of her parents, and she testified that she spent many of her vacations with her parents and very frequently visited them during such period.

Seven neighbors of the claimant testified to having seen the decedent staying and being cared for at the home of claimant on many different occasions during such five years, and some of them testified to having seen farm work being done by the claimant on the decedent's farm.

We have carefully read all of the evidence and consider it sufficient to say that it is our opinion that the undisputed competent evidence shows that \$1,000 was a reasonable and not excessive amount for the work and services so proven to have been performed and furnished by the claimant to the decedent during the period in question.

Therefore the judgment of the Circuit Court is affirmed.

Affirmed.

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138

44765

THOMAS E. CONNELLY,
Appellee,

v.

STEPHEN E. HURLEY,
JOHN W. CLARKE and
ALBERT W. WILLIAMS,
Civil Service Commis-
sioners of the City of
Chicago,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

339 I.A. 34

MR. PRESIDING JUSTICE FRIEND DELIVERED THE
OPINION OF THE COURT.

This cause came up on appeal as a companion
case with cause No. 44764. Separate briefs were filed,
but the facts and questions presented are precisely
the same. The opinion in cause No. 44764 is being
filed concurrently with this opinion, and for the
reasons indicated therein the judgment of the
Superior Court in this proceeding is likewise
reversed.

Judgment reversed.

Scanlan, J., concurs.

Sullivan, J., took no part.

Abstract

10352
GEN. NO. 10532

Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1948

131
339 I.A. 140

PATRICIA A. RYAN, an infant by
ROLAND J. RYAN, her next friend,
and BETTY J. LEADLEY,
Plaintiffs-Appellants

vs

DALE RIST,
Defendant-Appellee

APPEAL FROM THE
CIRCUIT COURT OF
STARK COUNTY

Dove, J.

The plaintiffs, Patricia A. Ryan and Betty J. Leadley, sisters, were guest passengers in an automobile driven by Everett E. Law on the evening of November 20, 1946. They were on their way to see another sister who was in a hospital in Kewanee and were proceeding in a westerly direction on state highway No. 93.

The evidence discloses that about 6:20 or 6:30 o'clock on the evening in question Everett E. Law, accompanied by the plaintiffs left Bradford in Law's automobile, Law was driving, Patricia Ryan sat in the center of the front seat and her sister, Betty Ryan was sitting at her right. The night was dark and foggy, with low visibility. As they approached the

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12/1/57

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U.S. DEPARTMENT OF JUSTICE

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MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

8. [Illegible]

9. [Illegible]

10. [Illegible]

11. [Illegible]

12. [Illegible]

13. [Illegible]

14. [Illegible]

15. [Illegible]

16. [Illegible]

17. [Illegible]

18. [Illegible]

19. [Illegible]

intersection of state highways No. 93 and No. 91, the right front wheel of the car in which they were riding came in contact with the rear left wheel of defendant's car which was standing in the right traffic lane of state highway No. 93. The concrete slab on Route No. 93 is eighteen feet in width with a black line down the center of the pavement. Defendant was on his way from Elmira to Toulon driving on Route No. 93 and according to his testimony he had reached the intersection and was ready to turn ^{left} into Route No. 91. His car stalled and shortly thereafter it was hit by the Law car.

There is a sharp conflict in the evidence as to the rate of speed at which the Law car was being driven, whether the lights on defendant's car were working, or whether he gave any warning that his car was blocking the highway in the right lane of traffic. Mr. Law testified that as soon as he saw the Risk car he put on his brakes and made a quick turn to the left, but not in time to avoid striking the Risk car; that there were no lights on the Risk car, or behind it, and that the first time he saw the defendant was when he ^{the defendant,} came around ~~from~~ the front of the ~~car~~ left side of his car after the accident with a flashlight in his hand and walking toward the Law car.

The defendant testified that he had been to Kewanee that afternoon and knew the generator and self-starter on his car were not working and he had to crank his car in order to start it; that he went to a garage to have his generator repaired, but was unable to have it fixed; that the charge in his battery was low, and he tried to rent or buy a battery but was unable to do so; that he had to crank the engine to start the

interference of the car in the road, and the car was in

front wheel of the car in the road, and the car was in

contact with the car in the road, and the car was in

standing in the road, and the car was in

The concrete side of the road, and the car was in

with a black line down the center of the road, and the car was in

was on his way from the car, and the car was in

and according to the car, and the car was in

and was ready to turn ^{left} at the intersection, and the car was in

anxiety to turn left at the intersection, and the car was in

There is a sharp curve in the road, and the car was in

rate of speed at the low end of the road, and the car was in

the lights on the car, and the car was in

any warning that the car was in the road, and the car was in

lane of traffic, and the car was in

which can be seen in the road, and the car was in

but not in time to avoid striking the car, and the car was in

no lights on the car, and the car was in

he saw the car, and the car was in

the car left side of the road, and the car was in

light in his hand and walking, and the car was in

The car was in the road, and the car was in

that afternoon and knew the car was in the road, and the car was in

car were not working and he had to crank the car in order to

start it; and he had to crank the car in order to

paired, but was unable to start it; and he had to crank the car in order to

battery was low, and he tried to rent or buy a battery, but was

unable to do so; and he had to crank the car in order to start the

car when he left Elmira and when he reached the intersection of Routes 93 and 91 his car stalled as he went to make a left turn onto Route 91; that he stepped on the starter a time or two and it would not start; that he then got out and pushed his car by hand a foot or so in order to get it off the black line; that the front and rear lights were lit and he took a flashlight and walked back a rod or two to flag a car he heard coming down the road, although he could not see it's lights. He further testified that this oncoming Law car was being driven fifty miles per hour at the time it passed him. As a result of the collision the rear bumper, the left rear fender, tail light, oil tank and the mechanism of the rear end of the Risk car was damaged and the right part of the front bumper, the right fender and head light and windshield on the Law car was damaged and both plaintiffs sustained personal injuries. The issues made by the pleadings were submitted to a jury resulting in a verdict finding the defendant not guilty, upon which verdict judgment was rendered and the plaintiffs appeal.

Inasmuch as this judgment must be reversed and the cause remanded for a new trial, on account of erroneous instructions, we express no opinion as to the weight of the evidence. Appellee tendered thirty-six instructions, nineteen of which were given. Of these nineteen given instructions, thirteen were directory in form and concluded by telling the jury that under the circumstances outlined the "plaintiff cannot recover" or "you should find the defendant not guilty" or "you must find for the defendant". In some of the instructions, two or more of these expressions were used in the same instruction. In the

given instructions the words "cannot recover" appear four times; the words "not guilty" appears sixteen times and the words "find for the defendant" appears three times. Counsel for appellants insist that the frequent repetition of these words in the instructions was erroneous and prejudicial as their tendency was to give the jury the impression that the court thought they should bring in a verdict for the defendant. Instructions of this character ^{have} ~~has~~ frequently been condemned by the courts as improper and prejudicial. (Cohen v. Weinstein, 231 Ill. App. 84; Daubach v. Drake Hotel Co., 243 Ill. App. 298; Baker v. Thompson, 337 Ill. App. 327; Gulich v. Ewing, 318 Ill. App. 506; Alexander v. Sullivan, 334 Ill. App. 42.) In view of the errors in several of the given instructions we are not, however, required to determine whether the giving of so many instructions of this character would require a reversal of this judgment.

In the fifth instruction given on behalf of appellee, the jury were told, in substance, that before the plaintiff, Patricia A. Ryan, could recover, she must prove (1) that the defendant was guilty of negligently operating his automobile, (2) that such negligence was the proximate cause of the collision, (3) that Patricia A. Ryan at the time and place alleged, was in the exercise of due care and caution for her own safety and concluded that if she had failed to prove any of these material elements of her case on the charge of negligence, the jury should return their verdict in favor of the defendant. In the tenth instruction the jury was told that the plaintiff, Patricia A. Ryan, had alleged in her complaint that at the time and place in question she was in the exercise of due care for her own safety, that this was a material allegation and she must prove it by a preponderance or greater weight of the evidence, that the law

would not presume Patricia A. Ryan was exercising due care and caution at the time of her alleged injury but she must prove by affirmative evidence she was in the exercise of due care and caution for her own personal safety, and then continued:

"Ordinary care is such care as a person of ordinary prudence would exercise under the same or like circumstance to those shown by the proof. If you believe from the evidence, under the instructions of the court, that at the time and place in question, the plaintiff failed to exercise ordinary care for her own safety, and such failure, if any, caused or proximately contributed to cause the injuries and damage complained of, then the plaintiff, Patricia A. Ryan, cannot recover, and you should find the defendant, Dale Rist, not guilty". In the fourteenth instruction given on behalf of the appellee the jury were told "that the plaintiff, Patricia A. Ryan, cannot recover against the defendant, Dale Rist, unless she was in the exercise of ordinary care at the time of the injury" ^{that} and by ordinary care or reasonable care and caution, as used in these instructions, is meant the exercise of that degree of care and caution to avoid injury and damage that a person of ordinary care and prudence would have exercised under similar circumstances". Patricia A. Ryan was sixteen years of age at the time of the collision and each of the three instructions entirely ignore the distinction between what constitutes due care and caution on the part of an infant, and what constitutes due care and caution on the part of an adult. The rule has long been established that an infant or minor is not held to the same degree of care and caution for his own safety as an adult. The rule is that an infant is

only required to exercise that degree of caution and care for his or her own safety which an ordinary child of his or her age, capacity, discretion, knowledge, experience and intelligence would have exercised under the same or similar circumstances. In *Illinois Iron and Watch Co., v. Weber*, 196 Ill. 526, at page 530 the court quoted with approval the following language from Judge Thompson, in his commentaries on Law of Negligence, (vol. 1, sec. 309), "Two lads of equal age and natural capacity, one of them raised in the country and the other in the city, might approach a given danger, and the one would be perfectly competent to care for himself while the other would be helpless in the face of it. Therefore the capacity, the intelligence, the knowledge, the experience and the discretion of the child are always evidentiary circumstances, -- circumstances with reference to which each party has the right to introduce evidence, which evidence is to be considered by the jury." The court then said: "The rule established by our own decisions is, that age is not the only element to be considered, but that intelligence, capacity, and experience are also to be taken into account, -- *Weick v. Lander*, 75 Ill. 93; *City of Chicago v. Keefe*, 114 id. 222; *Illinois Central Railroad Co. v. Slater*, 129 id. 91." (See also *Kerr v. Forgue*, 54 Ill. 482; ~~*Illinois Central R.R. Co. v. Slater*, 129 Ill. 91~~ ^{*Southwestern*}; *Baltimore & Ohio Southern Ry. Co. v. Then*, 159 Ill. 535; *Lake Erie & Western R.R. Co. v. Klinkrath*, 227 Ill. 439; *McGuire v. Guthmann Transfer Co.*, 234 Ill. 125 and *Hartnett v. Boston Store*, 266 Ill. 331.)

The fourth instruction given for appellee admonished the jury at length as to their duties and concluded with the statement, "and in rendering your verdict you should feel satisfied

that it is true and just and warranted by the evidence and the law of this case." This instruction was argumentative and should have been refused. It ~~ix~~ directed the jury to not only render a verdict which was true, just and warranted by the law and the evidence but one with which they "should feel satisfied" was true, just and warranted by the evidence and law in the case.

The sixth instruction given at the request of appellee was erroneous in that it told the jury that before Betty J. Leadley could recover she must prove "that the defendant, Dale Rist, was guilty of negligently operating his automobile at the time and place in question." This instruction limited the appellee's negligence to the time and place of the accident, and relieved him from liability for any negligence he may have been guilty of at and before the time of the accident, which may have been the proximate cause of the accident, such as his going out onto the highway alone, on a dark foggy night, with an automobile he knew was in a defective condition and apt to stop in the lane of traffic at any time, and which he knew could not be started on its own power. Such conduct on the part of appellee was one of the charges of negligence made in the complaint, was an issue of fact in the case, and should not have been ignored in the instructions which directed a verdict for the defendant. For the same reason appellee's sixteenth instruction should not have been given. It was a question of fact for the jury as to whether or not appellee was guilty of negligence in placing himself in a position where the accident might happen. *Edwards v. Hill-Thomas Lime Co.*, 378 Ill. 180.

The seventh instruction given on behalf of appellee concluded: "No presumption that the defendant, Dale Rist, was negligent, arises from the fact the accident happened." The eighth

given instruction told the jury that "the fact alone that the plaintiffs were injured or suffered damages, raises no presumption that they have a right to recover for such injuries and damages." The eleventh given instruction stated that the law does not presume that the plaintiff, Betty J. Leadley, was exercising due care and caution at the time of the alleged injury." The fifteenth instruction begins: "The court instructs the jury that under the law there is no presumption of negligence on the part of the defendant by reason of the happening of the accident in question." Instructions of this character, which single out particular elements or facts and tell the jury that no presumption arises by reason of the proof of such fact, were criticized and condemned in *West Chicago Street Railroad Co. v. Petters*, 196 Ill. 298; ~~City of Chicago~~ ^{City Ry. Co.} *v. Lowitz*, 218 Ill. 24; *Garvey v. Chicago Ry. Co.*, 339 Ill. 276; and *Minnis v. Friend*, 360 Ill. 328 and it was error to give them. (*Watson Orchards* ^{Inc.} *v. New York Central & St. Louis Railroad Co.*, 250 Ill. App. 22.)

The giving of the ninth instruction was also error. By this instruction the jury were told that negligence is the omission to do, or the doing of something which a reasonable man or woman, guided by those ordinary considerations which ordinarily regulate affairs, would do, or would not do. And that if the jury believed from the evidence, under the instructions of the court, that the sole cause of the injuries and damages to the plaintiffs was the negligent manner in which the automobile in which they were riding was driven, then it was the duty of the jury to find the defendant not guilty. This instruction introduced into the case a new issue not raised by the pleadings, that is, the manner in which Law was driving his automobile, and imputed

the negligence of Law, if any, to appellants. This instruction also exonerated appellee from all liability for his own negligence, if the jury believed from the evidence the accident was primarily due to the negligent manner in which Everett E. Law was driving his automobile. The negligence or non-negligence of Law was not an issue in this case, except insofar as it had a bearing on the question as to whether or not the appellants who were riding in his car as guest passengers, were exercising due care and caution for their own safety before and at the time of the accident. This instruction singled out the manner in which Law was operating his automobile as perhaps being the sole and only cause of the accident in question. The rule is that where the negligent acts of two or more persons proximately contribute to the injury of a third person, that neither party can escape liability for his own negligence by showing that the negligence of the other party contributing to the accident was greater than his own.

What this court said in the recent case of Baker v. Thompson, ~~What this court said in the recent case of Andersen~~ 337 Ill.App. 327, need not be repeated here, but ~~v. Meyer, No. 10244, need not be repeated here but~~ We are clearly of the opinion that the issues in the instant case should be submitted to another jury under proper instructions, and for the errors indicated the judgment of the Circuit Court of Stark County is reversed and the cause remanded for a new trial.

Reversed and remanded.

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339 I.A. 141

Appeal from
Circuit Court,
McHenry County.

Honorable
Ralph J. Dady,
Judge Presiding.

Honorable
Ralph J. Dady,
Judge Presiding.

Notwithstanding the enumeration of abstract legal propositions in plaintiff's brief, the primary issue presented in this cause is whether the judgment of the circuit court confirming the Master's findings is supported by the evidence.

The voluminous record is not only controverted and specialized, but contains irrelevant innuendos tending to obscure the issue. It appears that prior to December, 1930, plaintiff was the lessee

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of a farm known as the Clauson farm, which was owned by a man named Hussey. Plaintiff had a half interest in some of the stock and crops thereon paid for with sums borrowed from the defendant Hebron bank, for which plaintiff gave a note and chattel mortgage of \$1300.00.

In December, 1930, defendant C. W. Bailey and plaintiff bought out Hussey's interest. Plaintiff insists that his prior ownership together with this purchase gave him a three-fourths interest in certain enumerated stock and crops, whereas defendant maintains that plaintiff agreed to put in his equity so that they each would have a one-half interest. To secure his share of the purchase price, plaintiff executed and delivered to the Hebron bank his note and chattel mortgage. The note, as refinanced and modified from 1930 to 1934 so as to include his prior obligation, amounted to \$2609.34 in 1934 and included the 1934 growing crops.

At the time the parties purchased the Hussey stock, plaintiff leased defendant Bailey's farm also, which lease extended, in legal effect, by virtue of a holding over to March, 1936. Plaintiff continued to operate both the Hussey and Bailey farms on a share rent basis until the expiration of the Hussey lease in 1932, whereupon the stock and crops, owned by plaintiff and defendant, were sold or removed to the Bailey farm, which plaintiff operated until November 16, 1935. During this interval defendant Bailey received all milk checks, which were the principal source of revenue, and all proceeds from the sale of stock. Defendant maintains, however, and plaintiff denies, that defendant settled up with plaintiff each month when the milk checks arrived, and paid him his proportionate share, after deducting payments made on bills plaintiff charged to defendant. However, defendant's farm account books do not indicate any such monthly adjustments, and the only evidence of payments to plaintiffs was some cancelled checks for diverse sums paid during the intervening years.

The evidence further reveals that plaintiff rendered special services for defendant, including building a fence, renting and seeding additional land from which defendant's cattle were fed and tended, filling the silo for three years, and other lesser services with reference to the care of the stock and grain, for which he was not paid.

On August 24, 1935, the interest and principal on the note and mortgage was in default, and although \$150.00 had been paid, inasmuch as the money was derived from the sale of mortgaged stock, it had been applied on the principal. The bank, moreover, particularly its president, defendant Bailey, felt that plaintiff was neglectful in farming operations, and that the security was imperiled, whereupon notice of foreclosure was posted and served in accordance with the statutory requirements for chattel mortgages. (Ch. 95, §27, Ill. Rev. Stats.)

Immediately prior to the sale there was a meeting in plaintiff's house between defendant Bailey and plaintiff and their respective counsel, at which defendant urged plaintiff to sell all of his interest in the property on the premises, including some small machinery, 400 turkeys, and crops, all of which were not included in the chattel mortgage. Defendant proposed that if plaintiff agreed to sell this additional property and to vacate the premises within ten days after the sale, defendant would deposit with plaintiff's attorney a check for \$400.00 payable to plaintiff's wife. Defendant contends that the check was not made payable to plaintiff because he drank excessively, whereas plaintiff insists that it was because he would not accept the plan. Nevertheless, the check was given to plaintiff's lawyer, and inasmuch as plaintiff did not vacate the premises within ten days after the sale, it was returned to defendant's counsel.

The evidence is controverted whether plaintiff consented to the sale of the unmortgaged property. However, it appears that the sale proceeded openly with 75 to 100 people present, and plaintiff assisted in lining up the property. The stock and other chattels were not divided, but were offered singly, in combination, and finally as an undivided half interest in the whole. Defendant Bailey's bid of \$2300.00 for the entire one-half interest was the highest bid, and the sale, which included the unmortgaged property, was consummated with him. A report thereof was executed by the bank, and notice of the amount, purchaser, and expenses of the sale was delivered to plaintiff within 10 days.

Several days after the sale, plaintiff brought a prospective purchaser to the bank, interested in paying the amount plaintiff owed in return for his share of the chattels, but no agreement was reached since defendant Bailey would not divide the property.

Thereafter, plaintiff requested the return of his note from the defendant bank, and, inasmuch as there was a deficiency of some \$300.00 on the note after the sale, plaintiff was directed to consult defendant Bailey as bank president and as endorser. Defendant Bailey apparently stated that if all matters were regarded as settled between them, the note would be returned. The note was returned, and immediately thereafter defendant instituted forcible entry and detainer proceedings against plaintiff in the justice court, revealing that he already had another tenant. The court entered judgment against Earl Sanford, from which no appeal was taken. Nevertheless, plaintiff retained possession of the house until the expiration of his lease in March, 1936, when he moved to the farm of Don T. Smiley, his present counsel.

At the suggestion of counsel, who believed the foreclosure sale illegal and void, plaintiff removed certain items of equipment from the Bailey farm which he contended belonged to him and were

wrongfully sold at the foreclosure sale. Defendant claims that as a result of these acts he suffered a loss of \$300.00, since he had to give the new purchaser credit in that amount on his note. Defendant also contends that he paid plaintiff's bills in excess of plaintiff's share in the milk checks which accrued prior to November 16, 1935.

Plaintiff commenced this proceeding in January, 1936, in which he charged defendant, The Hebron State Bank, with failure to comply with the provisions for the sale of property in the Chattel Mortgage Statute (Ch. 95, §27, Ill. Rev. Stats.); with trespass for wrongfully taking possession of personal property; and sought an accounting from defendant Bailey under the share rent lease. Defendant denied the allegations, and filed a counterclaim for sums paid out at plaintiff's request, and for his use; and for property which plaintiff removed from the farm and converted to his own use.

The cause was submitted to a Master who presented an unsigned report in 1944, just prior to his death, in which he found that plaintiff was entitled to nothing and awarded \$808.02 to the defendant counterclaimant. The circuit court, in September 1947, confirmed the Master's report, dismissed the complaint, and entered judgment in favor of defendant Bailey.

It is readily apparent from the admissions of plaintiff's counsel in the record that all proper notices of sale were given, and that plaintiff's demand that the defendant bank pay a penalty of one third the value of the property for failure to give plaintiff notice of sale under the Chattel Mortgage Statute, was properly dismissed.

With reference to plaintiff's demand for reimbursement and damages for the wrongful taking of his property, it is uncontroverted that plaintiff executed a note and mortgage, which, when refinanced in 1934 amounted to \$2609.34, in order to pay for his one-half, or even three-fourths interest, in the chattels which

he and defendant Bailey purchased from Hussey. Although the principal was not due until 1936, the bank, apparently at the behest of its president who was also plaintiff's landlord, was within its legal rights under the terms of the note and mortgage in demanding foreclosure in 1935 when the interest payments were in arrears, and when it deemed the security imperiled by neglect and poor management.

Although there was proper compliance with the statute with reference to giving notice of the sale, it is evident that property not covered by the mortgage was sold. Plaintiff denies that he consented to the inclusion of this property in the sale, and it is uncontroverted that just prior to the sale defendant Bailey, apparently acting as bank president, landlord, and prospective purchaser, offered to pay plaintiff an additional sum of \$400.00 for the 400 turkeys, extra equipment and 1935 crops, which were not covered by the mortgage. However, this payment was coupled with the condition that plaintiff vacate the premises 10 days after the sale, despite the fact that plaintiff had a lease extending until March, 1936. Having nowhere to go, and insisting that this sum was grossly inadequate for his interest in the unmortgaged chattels, plaintiff did not accept this offer.

It is the opinion of this court that plaintiff was clearly entitled to some recompense for this property, although its sale did not render the foreclosure void. In this equitable accounting proceeding, plaintiff's claim for such recompense may properly be charged against, and eliminate, defendant's counterclaim for the deficiency on the note, which defendant, as endorser, allegedly had to pay to the bank, of which he was president. As herinbefore noted, defendant, as foreclosure purchaser, paid \$2300.00 for plaintiff's interest, whereas plaintiff's note to defendant's bank, which defendant endorsed, was for \$2,609.34.

... 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 2626. 2627. 2628. 2629. 2630. 2631.

10-10-1964

... e, per questo, il primo dei due problemi dell'ordine delle

The balancing of these claims herein is particularly justifiable inasmuch as defendant Bailey, as purchaser of plaintiff's interest, secured added benefit from the sale of the unmortgaged property, and, as bank president, had at one time agreed to disregard this alleged deficiency and deem the matter settled; but, apparently, for the purposes of this litigation, the obligation was resurrected. Moreover, although there is no evidence of fraudulent or tainted conduct, defendant Bailey's multiple roles of endorser, bank president, foreclosure purchaser and landlord, indicate the propriety of adjusting the equities more fully.

The evidence indicates further that in all other respects the sale was conducted properly and in accordance with the statute. It was held openly, with 75 to 100 people in attendance, bids were entertained on individual items first, then in combination, and finally the entire undivided one-half interest was offered. Inasmuch as the highest bid was that submitted by defendant Bailey on the undivided one-half interest, the property was sold to him. The fact that it did not bring, in 1935, as much as plaintiff thought it was worth, did not render the sale fraudulent, for there was no showing that other bids were suppressed. Nor would the fact that the property was not divided render the sale void ab initio, particularly since the evidence is not clear that plaintiff insisted upon such a division.

It is our opinion that plaintiff's rights under the share rent lease were counterbalanced by defendant's counterclaim for losses sustained when plaintiff, on advice of counsel, and under claim of rightful ownership appropriated property from the Bailey farm that had been sold at the foreclosure sale. Therefore, it would appear that neither party should be entitled to recover in this proceeding. Hence, the findings of the Master, as confirmed by the judgment of the circuit court with reference to the dismissal of plaintiff's complaint were in accordance with the facts

adduced, and should properly be affirmed. However, that portion of the judgment sustaining defendant Bailey's counterclaim and ordering plaintiff to pay him \$803.02 is in error and should be reversed, and the counterclaim should be dismissed. The trial court's directions for the payment of cost should be affirmed.

JUDGMENT AFFIRMED IN PART AND REVERSED
IN PART WITH DIRECTIONS and costs as directed.

12-2-49

The cause is remanded to the court
the jury court with instructions to the jury
and the court's decision with the costs
affirmed as directed.

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44586

JULIUS S. NEALE, as Trustee,
Plaintiff,

v.

ARCHIE PARKS et al.,
Defendants.

ELIZABETH DRUGGAN,
Counter-Plaintiff and Appellee,

v.

JULIUS S. NEALE, as Trustee,
and ARCHIE PARKS,
Counter-Defendants.

Appeal of BERNARD W. VINISSKY,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

339 I.A. 142¹

MR. PRESIDING JUSTICE FRIEND DELIVERED THE
OPINION OF THE COURT.

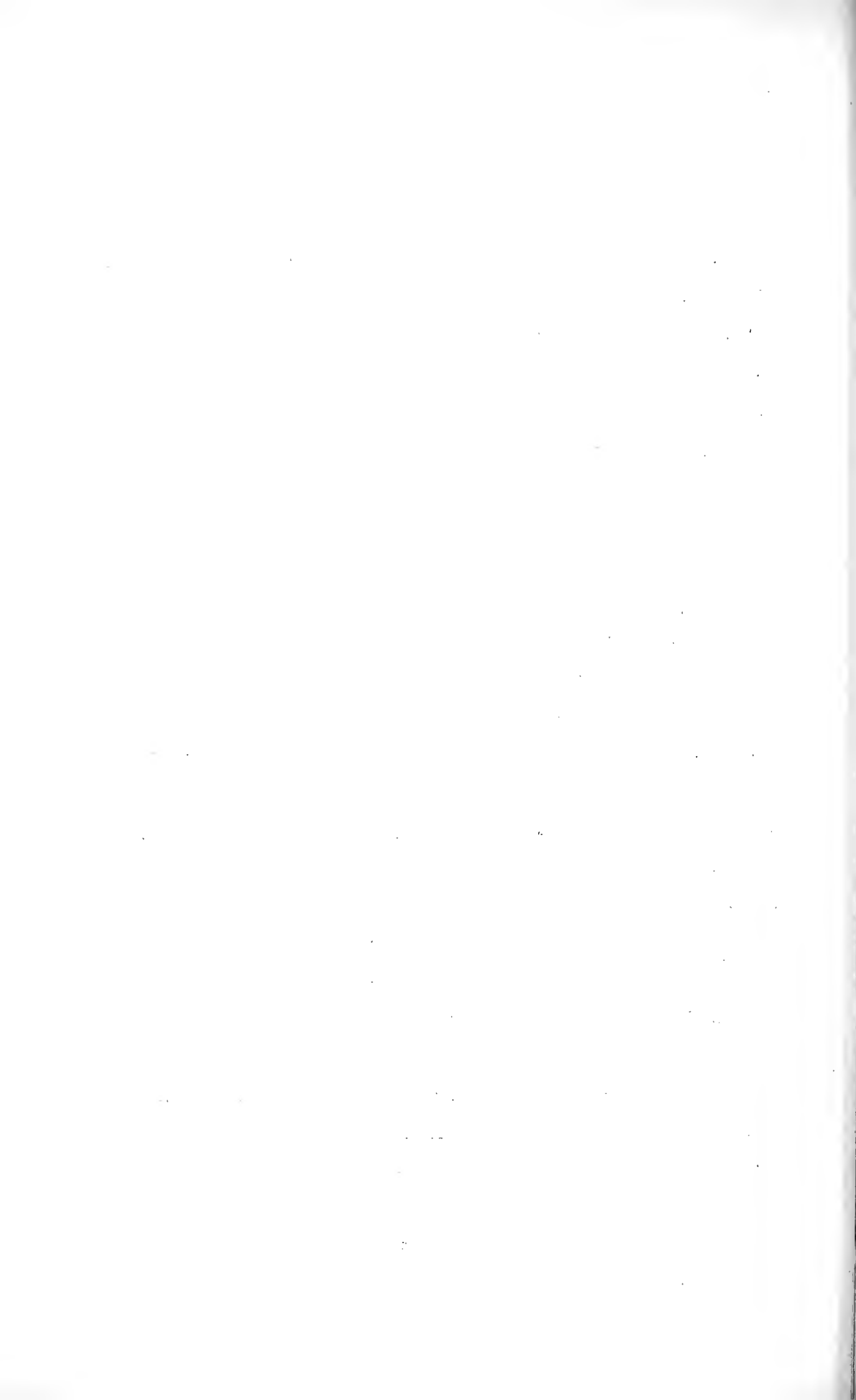
This is an appeal by Bernard W. Vinissky from an order of the Circuit Court directing him to account for rents collected by him from the tenants of an apartment building during the pendency of a foreclosure proceeding in which the controverted issues have not yet been determined. Vinissky was not a party to the proceeding when the order was entered, and by reason thereof contends that the court had no jurisdiction to order the accounting, and that until the fundamental issue in the cause, namely, who is the legal and equitable owner of the real estate, is determined, he should not be required to account.

More than 30 pages of the abstract of record are devoted to numerous pleadings, petitions, addition and dismissal of parties defendant and orders thereon, from which the salient circumstances may be summarized as follows:

In August 1943 Julius S. Neale, as trustee, by his counsel Bernard W. Vinnissky, filed a complaint to foreclose a

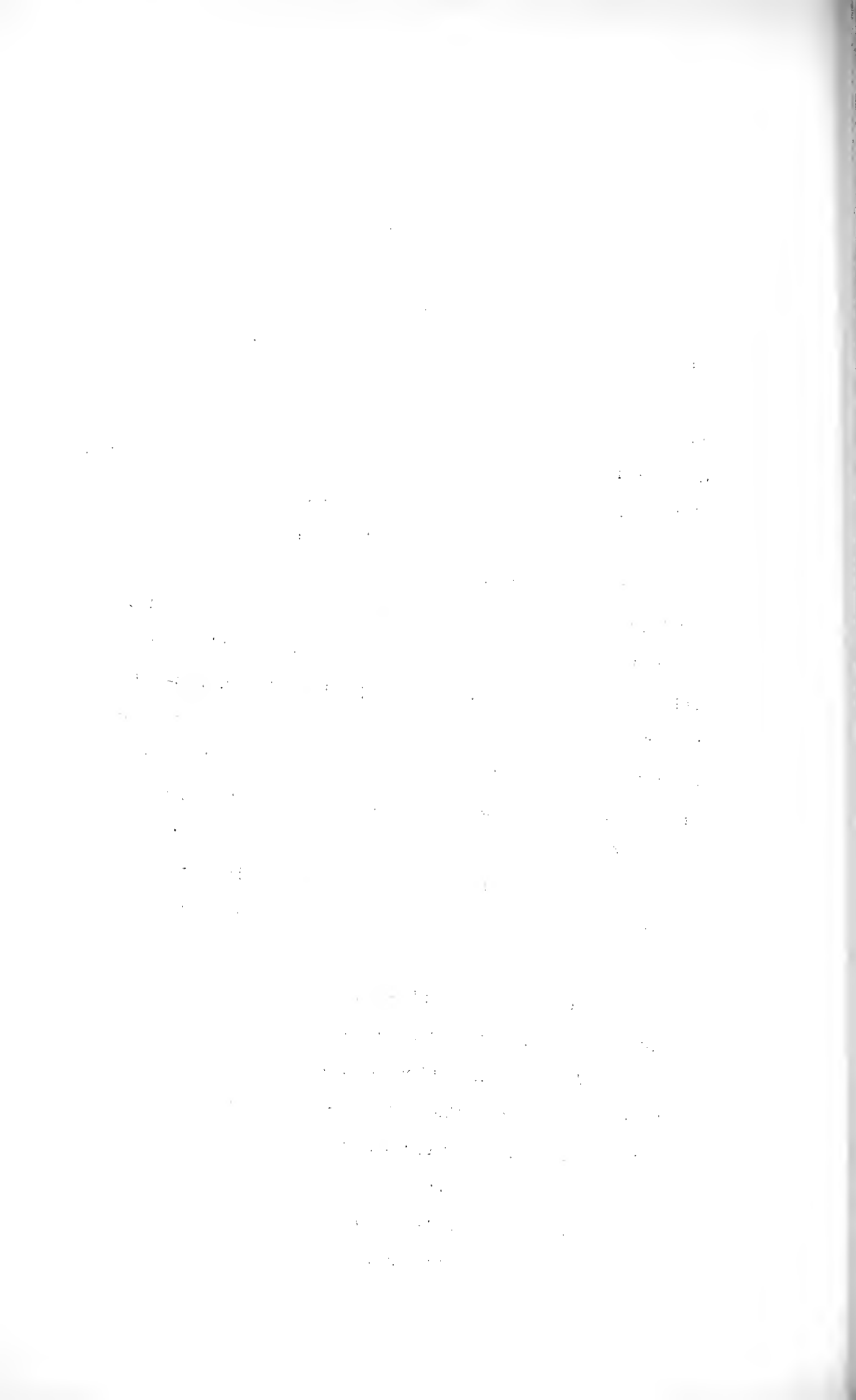
\$5000.00 mortgage. The defendant Archie Parks was the record title holder of the property. Elizabeth Druggan, hereinafter referred to as counter-plaintiff, was made a party defendant, but was never served with process and subsequently, on September 9, 1943, was dismissed from the suit. It is conceded by Vinissky that from August 1, 1943 to December 31, 1947 he collected approximately \$200.00 per month as beneficiary of the trust of which Neale is trustee and as agent in the collection of rents under an assignment from Parks, the holder of the title to the premises.

Two years after a decree of foreclosure and sale was entered on September 22, 1943, fixing the indebtedness due plaintiff in the sum of \$5367.56, counter-plaintiff, on October 25, 1945 filed an amended and supplemental petition alleging that she was then and had since April 25, 1921 been the owner in fee simple of the property under foreclosure; that on January 10, 1941, desiring to obtain a loan of \$1000.00, she executed and delivered a warranty deed to Edith Phillips as security, but never received any sum of money or any other consideration therefor; that on January 20, 1942 Edith Phillips executed and delivered a deed to Archie Parks for which no consideration was given, and that Parks acquired the deed with full knowledge of these conveyances; that the counter-plaintiff has been in possession of the premises ever since she acquired the fee-simple title thereto in 1921 and has paid all taxes levied and assessed against the property, as well as other charges; that at the date of the purported deed to Edith Phillips there was a



mortgage of record to Home Federal Savings and Loan Association, together with an assignment of rents, which Neale assumed to have purchased as trustee under a trust agreement dated July 26, 1943, and upon which he instituted the foreclosure proceeding now pending; that the money used and paid by Neale to Home Federal and Savings Loan Association for purchase of the mortgage was not his money either individually or as trustee but was in truth and in fact the money of the defendant Archie Parks; that Neale has been acting or permitting his name to be used as plaintiff in the foreclosure for the use and benefit of Parks and not on his own behalf; that notwithstanding these alleged transactions, counter-plaintiff continued to be the owner in fee simple of the property; and she sought by her counter-complaint to vacate the decree of sale entered September 22, 1943 in the aggregate amount of \$5367.56, to cancel the deeds alleged to be without consideration, offered to pay the mortgage indebtedness and for that purpose deposited with the clerk of the court the sum of \$6500.00.

Vinissky was originally named a party to the counter-complaint but was dismissed by order of court on February 7, 1946 on motion of the counter-plaintiff Elizabeth Druggan. The counter-defendants Neale, as trustee, and Parks denied the material allegations of the petition and alleged that the issues created by the counter-claim and the answers thereto are now pending before Philip Mitchel, master in chancery, to whom it had been referred;



that the issues have not been adjudicated, and that to allow the prayer of the counter-complaint would be to proceed in summary fashion to adjudicate a matter before hearing by the master; that there had been no finding in favor of the counter-plaintiff on her counter-claim or any finding by the court that Elizabeth Druggan is the owner of the fee-simple title to the property.

After being dismissed as a party to the suit Vinissky entered his special and limited appearance on February 20, 1948 for the sole purpose of moving to vacate and set aside an order of the court theretofore entered December 22, 1947 directing him to file on or before January 31, 1948 an accounting of all rents collected from the premises from August 1, 1943 to and including December 31, 1947. In his special and limited appearance he set forth that he is not a party to the cause, either as plaintiff, defendant or respondent; that at one time he was made a party to the counter-claim of Elizabeth Druggan but was dismissed by order of court; that before he can be commanded to perform certain acts he must be made a party to the proceeding; he denied that merely because the trustee, Neale, is a party, or that he (Vinissky) has acted as an agent for Parks in collecting rents, made him a party to the proceeding; and he contended that as to him the order for accounting is a nullity. The chancellor made no order as to the counter-petition of Elizabeth Druggan, and the answer of counter-defendants thereto, nor was there any ruling as to the special appearance of Vinissky, but when the matter came

up for hearing before the chancellor on June 9, 1948 Vinissky was again directed to account on or before June 15, 1948, and the hearings on the special appearance, motion in support thereof and all questions concerning such accounting, were set for June 17. In the meantime Vinissky duly filed his notice of appeal from the order directing him to account, and the sole question before us is whether the court had jurisdiction to enter the order, Vinissky not being a party to the proceeding nor, as he claims, in privity with Parks for whom he was collecting the rents as agent under the assignment which Parks had acquired from the Home Federal Savings and Loan Association when he purchased the mortgage, and also whether the order to account was improvidently entered before the real issue as to who was the legal and equitable owner of the real estate had been tried and determined.

The gist of the contention made by counter-plaintiff is that Vinissky, "for whose benefit, all the proceedings were prosecuted and defended, is a real party in interest, and is concluded and bound by all the orders and decrees entered in the cause," and that the order of June 9, 1948, directing him to account is not subject to review. The mere fact that Vinissky acted as attorney of record for one of the parties to the cause does not make him a party in interest or a party to the proceeding. Although he was named a party to the cause in the counter-claim, the order granting leave to file the counter-claim dismissed him as a party. We think that People v. Finnegan, 350 Ill. 109,

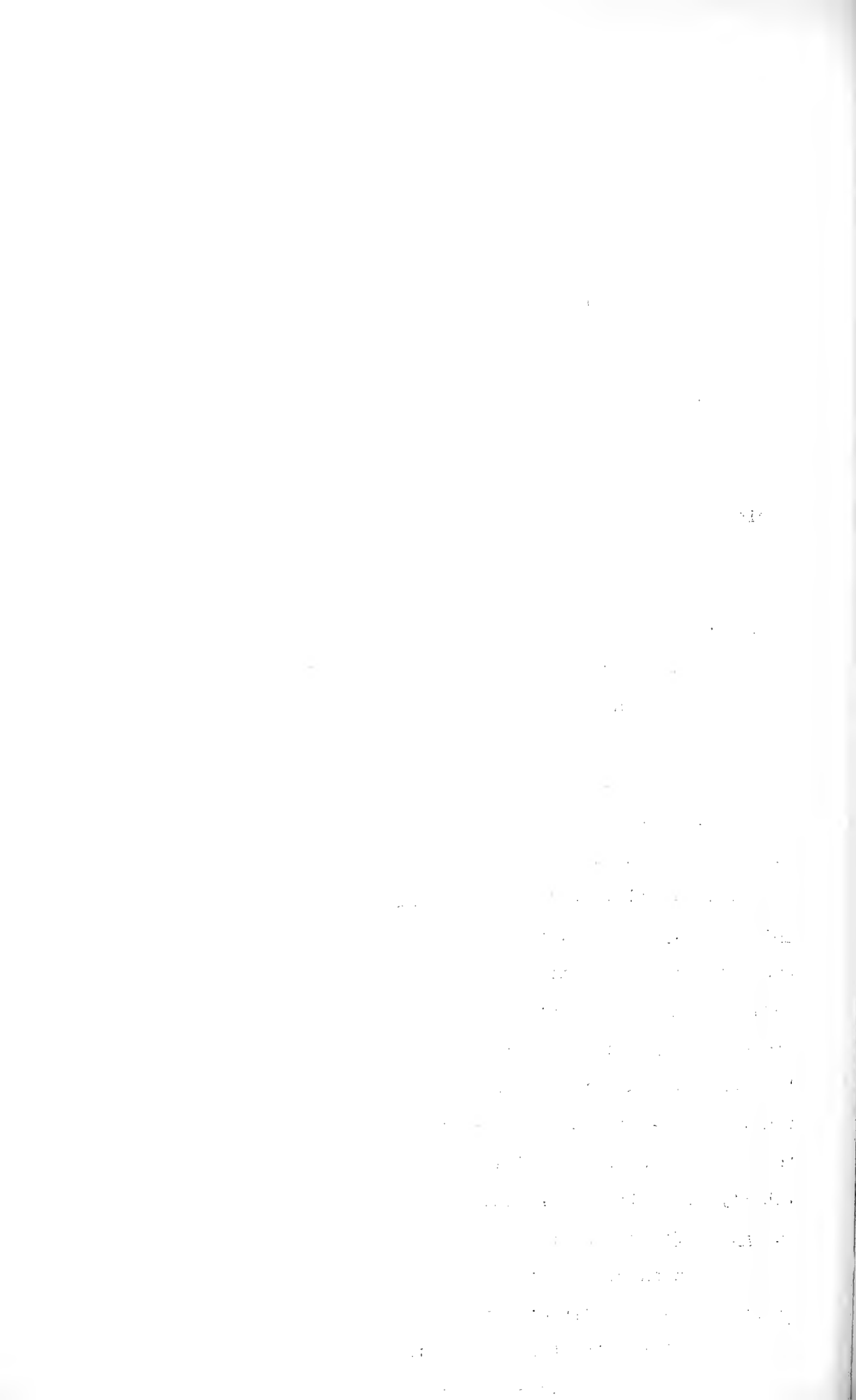
is in point. There an attempt was made to sustain the decree on the ground that the relator as an attorney was an officer of the court, and hence that the court had, quite apart from the specific directions of the mandate, summary jurisdiction to enter the order against the relator. The order had required him to refund the money which he had received and retained as solicitor's fees, not to his client, but to the opposite party. The court held the rule to be well settled that "courts have no summary jurisdiction over an attorney to compel him by order or rule to pay over moneys unless the relation of attorney and client exists between the attorney and the party seeking such summary relief. [Citing numerous decisions.] The rule has its basis in the right of an attorney, except where the relation of attorney and client exists, to have his liabilities established in the ordinary channels of legal procedure. (In re Haskin, 18 Hun, (N.Y.) 43). In the Matter of Schell, 58 Hun, (N.Y.) 440, the court said at page 442: 'It is because of the relations existing between attorneys and clients, that the client is allowed to pursue this extraordinary remedy; and it is because it is the duty of the court to see that the attorney acts with fidelity, as well to the court as to the client, that it assumes this jurisdiction. There does not seem to be any principle upon which a stranger, simply because he has become the owner of a demand which had once been owned by a client, can seek this protection of the court.' The relation of attorney and client cannot exist between the attorney for one party and the opposite party to a suit or proceeding and the latter cannot

invoke against the former the summary jurisdiction which a court may exercise for a client's protection. (Crane v. Gurnee, 71 Atl. (N.J.) 338). The relator represented the complainant in the suit for divorce and the circuit court, upon the defendant's motion, summarily ordered the relator to refund to the defendant money which the latter had paid to or for the complainant. Obviously the defendant did not sustain the relation of client towards the relator, and the circuit court had no jurisdiction to grant summary relief against him at the instance and in favor of the defendant." In conclusion the court said that "Not only was the * * * proceeding summary and unwarranted so far as the relator is concerned, but the subsequent proceedings were likewise anomalous." In the case at bar if counter-plaintiff had wished to make Vinissky liable to account she should not have dismissed him as a party to the suit; or having dismissed him, she could have, by amendment to pleadings and service of summons, brought him back into the proceedings. In In re Estate of Rackliffe, 366 Ill. 22, defendant appeared before the Probate Court in response to a subpoena as a witness and attended the hearing during which the suggestion was made that she had bonds in her possession belonging to the estate. The Probate Court entered an order requiring her to turn over the bonds to the conservators, and later a motion was made by the conservators to have her adjudged in contempt for failing to comply with the order. She then filed a special appearance questioning the jurisdiction of the court over her or to enter the order against her, and asked ^{that} ~~that~~ part of the order



be eliminated. The petition was dismissed and she was ruled to show cause for failure to turn over the bonds. On appeal the Supreme Court held that "It is an elementary principle of jurisprudence . in all civilized countries that before property or liberty may be taken from an individual he shall have an opportunity to be heard on charges brought against him. This is a rule so universal in its application to all common law, chancery or statutory proceedings that there is general agreement that no court has power otherwise to divest a person of property or punish him. In fact the recognition of that basic principle of justice is so widespread that courts are now seldom called upon to restore rights of individuals so ruthlessly taken from them. (Leininger v. Reichle, 317 Ill. 625; Heppe v. Szczepanski, 209 id. 88; Botsford v. O'Conner, 57 id. 72.) * * * The probate court was without jurisdiction of the person of appellant [defendant] and it matters not that it may be shown, on proper legal procedure, by which due process of law is exercised, that the bonds in question belonged to the estate of the incompetent. Short-cut court proceedings cannot be substituted for the provisions of a special statute where the rights and liberty of a citizen are involved." We think the Finnegan and Rackliffe cases are decisive of the question before us.

It should be stated in fairness to Vinissky that after he had been directed to account he wrote a letter to the chancellor, with the request that it be not construed as an appearance nor as a waiver of his position that the order requiring him to account "is a nullity," calling attention to the fact that he was not a party to the pro-



ceeding, that he was not present nor represented by counsel when the order was entered, nor at subsequent discussions in court after the entry of the order, but at the same time advising the court that up to December 31, 1947 he had collected \$9,253.54 for rents and expended for the maintenance, operation and preservation of the property and the interest of Parks therein and at his direction, the sum of \$6125.60.

Vinissky takes the further position that before counter-plaintiff can be entitled to an accounting, the hearing before the master must be concluded, the trial court must pass upon the master's report, the trial court must find the issues in favor of the counter-plaintiff, must find that the counter-plaintiff is the legal or equitable owner of the premises, that counter-defendant Archie Parks is not the legal and equitable owner of the premises, that the deeds from Elizabeth Druggan to Edith Phillips and from Edith Phillips to Archie Parks are void, and must determine the real and fundamental issue in this cause, namely, who is the legal and equitable owner of the real estate. He says that since Elizabeth Druggan parted with the title by her deed and Archie Parks is now the legal owner and holder of the record title, unless and until the court by a proper decree again confirms and finds title in Elizabeth Druggan, she is not entitled to any accounting of rents. We think this position is sound. The order requiring him to account was not only premature, but inasmuch as he was not a party to the proceeding or even the real party under the authori-

ties cited or in privity with Parks, the court had no jurisdiction over him.

As to the order being appealable, it would seem to us that since Vinissky stood in jeopardy of being committed for contempt if he had not complied with the order or appealed therefrom, he is entitled to have a court of review determine his rights. During the pendency of this appeal counter-plaintiff made a motion to dismiss the appeal. Inasmuch as we have adversely disposed of the issues raised in the motion, it is denied, and the order of the Circuit Court directing Vinissky to account is accordingly reversed.

ORDER REVERSED.

Scanlan and Sullivan, JJ., concur.

44448

THE PHILADELPHIA AND READING
COAL AND IRON CO., a corpora-
tion,

Appellee,

v.

CALUMET SHIPYARD AND DRY DOCK
CO., a corporation,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

339 I.A. 142²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE
COURT.

An action on the case. A jury found the issues
for plaintiff and assessed its damages in the sum of \$7,000.
Defendant appeals from a judgment entered upon the verdict.

The complaint alleges that defendant is engaged
in a dock and shipbuilding business; that on and prior to
July 18, 1927, plaintiff owned and possessed certain real
estate in Chicago, Illinois; that upon said real estate "is
a dock property fronting east on the Calumet River and on
the North side thereof there is a slip known as Howard
Slip, approximately 110 feet in width, extending from the
Calumet River westward into said real estate for a distance
of approximately 300 feet, the South 48 feet of which is on
the property of the plaintiff and the North part thereof
is on the property of the defendant. The plaintiff and its
predecessors in title constructed a dock made of piles and
timbers along the South line of said slip (and the defend-
ant constructed a dock likewise composed of piles and
timbers along the North side thereof) and the slip was
dredged sufficiently to accomodate large lake boats. 9.
That on or about March 1941 the defendant commenced the
construction on shore and launching into said Howard Slip

of a number of large steel boats and has continued such construction and launching up to the present time. 10. That said boats have from time to time been launched by the defendant by sliding them down skids sidewise into said slip, in a negligent, careless, reckless and unworkmanlike manner, without taking the necessary precautions to prevent them from injuring the property of the plaintiff, and without controlling the speed under which the boats were launched into the water and without taking precaution to prevent them from bumping into the dock of the plaintiff, as a result of and in consequence of which vast quantities of the water in the slip have from time to time been caused to flow against and over the wall of the dock of the plaintiff with great force and violence, which caused the land of plaintiff to become inundated with water and wash back into said slip, carrying large quantities of earth therewith, and caused said boats to cross said slip and bump into the wall of plaintiff's dock along the property of the plaintiff with great force and violence and injury to the same and destroy parts thereof, and to wash soil into said slip and fill the same so as to greatly impede traffic therein and reduce the value of the real estate of the plaintiff. * * * 12. That said damage is the proximate result of the carelessness and negligence of the defendant, in the manner in which it launched said boats and in its failure to control the speed with which they were launched and in its failure to take necessary precautions to see that waves of great force and violence were not caused to flow over onto

the property of plaintiff and in causing said boats to bump into the wall of said dock and in destroying said dock and washing said real estate into the said slip * * *. To the damage of the plaintiff in the sum of \$50,000."

After defendant's motion for an instructed verdict at the close of plaintiff's case had been denied plaintiff, by leave of court, filed the following amendments to the complaint:

"1a. In Paragraph '10' of said Complaint * * * strike the following words: 'in a negligent, careless, reckless and unworkmanlike manner, without taking the necessary precautions to prevent them from injuring the property of the plaintiff, and without controlling the speed under which the boats were launched into the water and without taking precaution to prevent them from bumping into the dock of the plaintiff.'

"2a. Insert at the end of said Paragraph '10', after the word 'plaintiff', the following: ', and that said acts of the defendant were not a reasonable and proper use of its property.'

"3a. In Paragraph '12' of said Complaint, beginning on Line 1 thereof, strike the following words: 'That said damage is the proximate result of the carelessness and negligence of the defendant, in the manner in which it launched said boats and in its failure to control the speed with which they were launched and in its failure to take necessary precautions to see.'

"4a. In * * * Paragraph '12' strike the word 'not'

and insert in lieu thereof the word 'thereby.'"

After defendant answered the complaint and the amendments thereto the case was submitted to the jury upon the question whether "the launchings of boats by the defendant in the manner adopted by defendant, in view of the surroundings, was an unreasonable and imprudent use of its property"; and also upon the question as to whether "the plaintiff's dock property was damaged as the direct result of such unreasonable and imprudent use, if any."

Defendant contends that "plaintiff's complaint as amended failed to state a cause of action and was inconsistent with its other pleadings." In the trial court defendant filed a written motion for a new trial in which three grounds only were raised, viz: "1 - There is no evidence to support the verdict in favor of the plaintiff and against the defendant. 2 - There is no evidence that any act of the defendant damaged the property of the plaintiff. 3 - The plaintiff failed to prove any pecuniary damage whatsoever to its property."

"* * * If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party filing the same will be deemed to have waived all causes for a new trial not set forth in his written grounds and in the Appellate Court will be confined to the reasons specified. * * * The above holding by this court is applicable to both civil and criminal cases.

(Yarber v. Chicago and Alton Railway Co., 235 Ill. 589; Anderson v. Karstens, 297 id. 76; Bromley v. People, 150 id.

297.)" (People v. Cohen, 352 Ill. 380, 382. See, also, People v. Hatcher, 334 Ill. 526, 535.)

Defendant is not in a position to raise the instant contention, and upon the oral argument in this court did not urge it.

Defendant also contends that "a plaintiff does not make a case by submitting circumstantial evidence of a number of possibilities and leaving the jury to choose that which it considers most plausible. The evidence shows that the condition of plaintiff's dock could have been brought about by any one of several different causes." Defendant argues that "there are any number of reasonable explanations possible in this record and the selection of any one of them is only a guess - whether a good guess or bad one is immaterial."

In Lindroth v. Walgreen Co., 338 Ill. App. 364, we stated (pp. 376, 377, 378):

"* * * In our opinion upon the first appeal (320 Ill. App. 112) we refer to certain authorities that hold that where uncertainty arises as to the inferences that may legitimately be drawn from the evidence so that fair-minded men may honestly draw different conclusions, the question is not one of law, but one of fact to be settled by the jury. In a late case, Roadruck v. Schultz, 323 Ill. App. 476 (appeal denied by the Supreme court, 399 Ill. 628), there were no eyewitnesses to the accident in question, but we held that the plaintiff had the right to prove his case by direct or circumstantial evidence. The principal argument urged by the appellant (one of the defendants) in support of the

appeal was that "where equally reasonable inferences may be drawn from the known facts, one leading to the conclusion of liability and the other to nonliability, the plaintiff has failed to make a case for a jury," * * * that "inconsistent conclusions were equally capable of being inferred from the undisputed evidence" in this case; that "neither of these inferences finds any greater support in the record than the other," and, therefore, plaintiff failed to make out a prima facie case.' (p. 431) We stated that we did not agree with this contention, and in support of our position we quoted (pp. 481, 482) from an opinion by Mr. Justice McSurely in Turner v. Cummings, 319 Ill. App. 225, 228, 229:

"In the petition for rehearing filed by the receivers of the streetcar company, it is also said "It is fundamental that an inference cannot be drawn from a fact or state of facts when an inconsistent inference may as readily be drawn from the same facts or state of facts." There are some decisions of this court and probably others where this has been stated, but it is not the law. As we said in Plodzien v. Segool, 314 Ill. App. 40, the law is that where "uncertainty arises as to the inferences that may legitimately be drawn from the evidence so that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact to be settled by the jury. Denny v. Goldblatt, 298 Ill. App. 325; Chicago & N. W. Ry. Co. v. Hansen, 166 Ill. 623; Moore v. Rosenmond, 238 N.Y. 356; Kavale v. Morton Salt Co., 242 Ill. App. 205; Norris v. Illinois Central R. Co., 88 Ill. App. 614; Richmond & Danville R. Co., v. Powers, 149 U.S. 43; Gunning v. Cooley,

281 U.S. 90; Best v. District of Columbia, 291 U.S. 411."

See also Reilly v. Peterson Furniture Co., 314 Ill. App. 46.

Note the language of Judge Pound in the Moore case and of Chief Justice Hughes in the Best case.'

"Our opinion proceeds: 'See, also, Lawrence v. Industrial Com., 391 Ill. 80, where the Supreme court in passing upon the province of the Industrial Commission stated (pp. 84, 85):

"'The rule is well settled that it is the province of the Industrial Commission to draw reasonable inferences and conclusions from evidentiary facts, and the courts are not privileged to set aside the findings of the commission unless they are manifestly against the weight of the evidence * * * and it is the exclusive duty and province of the commission to weigh the evidence and draw any and all reasonable inferences therefrom, and its conclusion in such case is final and not subject to review * * *. If the undisputed facts permit an inference either way, that is, if one reasonable mind may draw one inference and another reasonable mind a different inference from such facts, then the commission alone is empowered to draw the inference and its decision as to the weight of the evidence will not be disturbed on review." It will be noted that the Industrial Commission, like a jury, is the trier of facts. (See, also, Reilly v. Peterson Furniture Co., 314 Ill. App. 46, 47.)'

"While we are satisfied that the action of our Supreme court in denying an appeal in Roadruck v. Schultz, supra, is decisive of the question before us, we note that Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 35, and

Lavender v. Kurn, 327 U.S. 645, 650, follow the same rule."

We hold that there is no merit in the instant contention.

Defendant argues that certain causes other than the launchings of the boats by defendant were more likely to produce the condition of plaintiff's dock in 1945; that the "tooth of time" and the lack of proper repair and maintenance contributed to the damage to the dock; that when a wind was blowing from the east to the northeast a choppy sea would be created in the Calumet River and that sea would go up into the slip; that the use of plaintiff's dock for the storage of sand ~~xxx~~ would be a strain upon its dock; that the use of the dock by the steamers "Gilbert" and "American" would tend to cause the condition. All of these theories of fact were submitted to the jury and undoubtedly considered by them in reaching their verdict. It would be idle for defendant to argue that the pounding of the waves upon plaintiff's dock produced by the 52 launchings did not cause any damage to plaintiff's property. There is force in plaintiff's argument that certain evidence shows that the real damage to plaintiff's property occurred directly across from the point of the launchings.

Defendant next contends that "the burden is upon plaintiff to establish by the evidence that the damage to its dock was the direct and proximate result of some act or acts on the part of the defendant. This burden has not been met." Plaintiff did not attempt to prove any damage to the part of its dock above water. Howard Slip extends westward from the Calumet River for a distance of about 800 feet. It

is 110 feet in width, the south 43 feet is owned by plaintiff and the north 62 feet by defendant. The property of both parties fronts east on the Calumet River. It is admitted that from 1941 to 1945, both inclusive, 52 ships were launched sideways into Howard Slip by defendant. The ships ranged in length from 66 feet to 195 feet, with beams ranging in width from 18 feet to 45 feet. The largest ships had a displacement weight of 243 tons, and "143 tons for those with a length of 100 feet and a beam of 25 feet." The boats with a length of 64 feet and a beam of 18 feet had a displacement weight of 54 tons. The skids on which the boats were launched were from 25 feet to 40 feet long and they would "extend out over the edge of the dock at least half of the beam of the boat." When the rope is cut there is nothing to check the speed of the boat until it hits the water, and it goes down the greased skids "quite rapidly." Darby, who testified for plaintiff, stated that when a boat hit the water it came with quite a force; that a great wave came along and "went all the way up onto the second track and was coming quite fast; the people ran"; that some of the water went over the track and settled down at its lower end and "sunk" into the sand in the yard, and some of it washed back into the river; that most of the launchings wash pretty hard and take all of the loose stuff back into the river with it; that in the 40 or 50 launchings that he observed the waves generally went up over the dock; that when a boat hit the water at the time of the launching there was quite a vibration that could be felt for some distance; that some of the launchings created "enormous waves"; that it depends a lot on how the boat hits the water;

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that "some flat boats when they hit flat make a big noise, sort of a big tum, and you can feel those more than you can those that hit the edge"; that "I have stood as much as 100 feet away from the dock and I always felt it"; that "I could tell when the boat hit without looking that way"; that some of the waves when they came on the dock were still two or three feet high. Albert Carson, a witness for plaintiff, was employed by the Lake Sand Company. He testified that he had seen about twenty launchings; that they created waves and when the boat hit the water the waves went over the second track on the west end of the slip; that these tracks were on the property of the Lake Sand Company, that is on the south side of the slip; that when boats were launched into the slip he "heard a vibration like a quick thump"; that when the boat hit the water he could feel the dock shake; that he could feel the dock shake where he stood on the ground about 200 feet from the face of the dock.

Plaintiff introduced evidence tending to show that in 1942 its dock below the water^{line} was in "ordinary condition" and in alignment, but the top of the dock was in bad shape. Plaintiff also introduced evidence that in 1947 the alignment of the dock for a distance of approximately 450 feet was away from the original line, having bent over and leaned toward the water, and that it would cost \$82.50 per lineal foot to reconstruct the 450 feet. Defendant offered evidence tending to prove that the dock was beginning to disintegrate in 1937 and was then out of line, but the jury believed the testimony of plaintiff, and defendant raises no contention in its brief that the verdict of the jury

is manifestly against the weight of the evidence.

[It may be conceded that this is a case in which it was difficult for the jury to ascertain the amount of damages with certainty. The law that applies to such a situation seems clear:

In Story Parchment Co. v. Paterson Co., 282 U.S. 555, the court stated (pp. 562, 563, 564):

"Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. Taylor v. Bradley, 4 Abb. Ct. App. (N. Y.) 363, 366-367:

"It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain

whether such damages resulted necessarily and immediately from the breach complained of.

"The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount."

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 379. Compare The Seven Brothers, 170 Fed. 126, 128; Pacific Whaling Co. v. Packers' Assn., 138 Cal. 632, 638. As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. Allison v. Chandler, 11 Mich. 542, 550-556. That was a case sounding in tort, and at page 555 the court, speaking

through Christianity, J., said:

"But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he can not show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice.

* * * * *

"Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

"And again in Gilbert v. Kennedy, 22 Mich. 117, 129 et seq., also a tort action, the court, through the same eminent judge, pointed out that cases will often occur in which it is evident that large damages have resulted, but where no reliable data or element of certainty can be found by which to measure with accuracy the amount. Rejecting the view that in such cases the jury should give only nominal, that is, in effect, no damages, leaving the injured party without redress, the court said (p. 130):

"To deny the injured party the right to recover

any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result.'" (Italics ours.)

In Bigelow v. RKO Radio Pictures, 327 U.S. 251, the court cites with approval from Story Parchment Co. v. Paterson Co., supra, and states (pp. 265, 266):

"'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. Story Parchment Co. v. Paterson Co., supra, 565; and see also Palmer v. Connecticut R. Co., 311 U.S. 544, 559, and cases cited." (Italics ours.)

In Johnston v. City of Galva, 316 Ill. 598, the court said (pp. 603, 604): "Where the right of recovery exists the defendant cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry in the instant case is such that it is difficult, if not impossible, to ascertain with mathematical certainty the amount of the defendant in error's damages, but this difficulty affords no answer to a cause of action which results from a breach of duty imposed by law. The unliquidated damages growing out of the commission of a tort are seldom susceptible of exact measurement. The rule

is, that while the law will not permit witnesses to speculate or conjecture as to possible or probable damages, still the best evidence which the subject will admit is receivable, and this evidence is often nothing better than the opinions of persons well informed upon the subject under investigation. (Daughetee v. Ohio Oil Co., 263 Ill. 513.)⁴ (Italics ours.)

In the instant case plaintiff claimed that the damages it sustained were \$27,125. The jury awarded plaintiff \$7,000 damages. In People v. Hanisch, 361 Ill. 465, the court said (p. 463): "The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." All believers in the jury system must heartily approve this statement of our Supreme court.

This case was well tried. The able lawyers for defendant were unable to urge any of the grounds usually raised in cases of this kind. The trial judge sustained the verdict of the jury. It is our considered judgment that we would not be justified in disturbing the verdict and judgment in the instant case. The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

44718

ROBERT FECHTNER, a minor, by
Herman Fechtner, his father and
next friend,

.Appellant,

v.

GEORGE VANDERWALL,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

339 I.A. 143¹

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on the verdict of a jury in favor of defendant in an action to recover damages for personal injuries.

On February 1, 1942, plaintiff, aged seven years and eleven months, and other young boys were coasting on their sleds down the west slope of a hill located on the east side of Morgan Street about midway between 89th and 90th streets in the City of Chicago. Morgan Street runs north and south and is about thirty-five feet wide with a ten-foot parkway and a six-foot sidewalk along the east side. On the day of the occurrence Morgan Street was icy and slippery. Plaintiff came down the hill upon his sled, crossing the sidewalk and parkway onto Morgan Street directly into the path of defendant's automobile which was proceeding north on Morgan Street about five feet from the east curb thereof. Plaintiff was struck by the front bumper of defendant's automobile, causing the injuries here complained of.

As grounds for reversal, plaintiff urges, among other things, that the court erred in giving defendant's instructions 17, 19, 21, 24, 25, 26, 28 and 29, and in refusing to give plaintiff's instruction 31.

Defendant's instruction 17 informed the jury that before the plaintiff can recover it must find that "at the time of and immediately preceding the accident plaintiff was in the exercise of due care and caution for his safety as a reasonably prudent and careful person of his age and experience would exercise under the circumstances."

The rule has been repeatedly announced that plaintiff is required to exercise only the care that a child of his age, capacity, intelligence and experience would exercise. (Deming v. City of Chicago, 321 Ill. 341; Maskaliunas v. Chicago & W. I. R. R. Co., 318 Ill. 142; Moser v. East St. Louis & Interurban Water Co., 326 Ill. App. 542. In Abbs v. Rob Roy Country Club, 337 Ill. App. 591, where a similar instruction was criticized which read "that degree of care and caution which an ordinarily prudent person of the age, capacity and experience of the plaintiff would ordinarily use. . .," we held that that the absence of the word intelligence did not render objectionable the instruction there complained of, for the reason that the words capacity and intelligence are interchangeable, citing Burns v. City of Chicago, 248 Ill. App. 204. In the instant case, however, the instruction complained of omitted both the word capacity and the word intelligence, the lack of which we think, under the authorities last cited, makes it defective. It would seem that consideration by the jury of the boy's intelligence is equally important with their consideration of his age and experience in determining whether he exercised the necessary degree of care.

An instruction substantially the same as defendant's instruction 19 was approved in Koshinski v. Illinois Steel Co., 231 Ill. 198, 204. Criticism is leveled at defendant's instruction 21 because it limits the requirement of due care to the period "immediately before and at the time of the accident." We think this objection is without merit. See Peterson v. Chicago Traction Co., 231 Ill. 324. With respect to defendant's instruction 24, we think it is consonant with defendant's theory of the case and therefore not objectionable. Defendant's instruction 25 states that if the jury believes that "plaintiff was guilty of contributory negligence" it should find in favor of defendant. This instruction is misleading, for the reason that the jury might believe that any negligent act on the part of the plaintiff which contributed to the injury would warrant a finding against the plaintiff. To bar a recovery plaintiff's negligence must be the proximate cause of the injury. (Consolidated Coal Co. v. Bokamp, 181 Ill. 9; Schmidt v. Anderson, 301 Ill. App. 28; Williams v. Stearns, 256 Ill. App. 425.) Defendant's instruction 26 contains the same defect which appears in defendant's instruction 25, in that it refers to contributory negligence of plaintiff "that helped to bring about the accident in question." Criticisms leveled at defendant's instructions 28 and 29 are not well grounded, nor do we think the court erred in refusing to give plaintiff's instruction 31.

Since defendant's instructions 17, 25 and 26 are peremptory their defects, heretofore shown, cannot be cured by other instructions. (Cromer v. Borders Coal Co., 246 Ill. 451; Ratner v. Chicago City Ry. Co., 233 Ill. 169; Illinois Iron and Metal Co. v. Weber, 196 Ill. 526.)

Moreover, the record shows that defendant gave fourteen instructions, nine of which were peremptory, closing with the words "you should find defendant not guilty" or words of similar import, directing the jury, in effect, to find in favor of defendant. The practice of repeatedly concluding instructions with these phrases has often been condemned by our courts. (Gulich v. Ewing, 318 Ill. App. 506.) See Baker v. Thompson, 337 Ill. App. 327.

In the view which we take of this case we consider it unnecessary to discuss the weight of the evidence or the other points raised.

For the reasons given, the judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

BURKE AND KILEY, JJ. CONCUR.

44760

VILLAGE OF SKOKIE,

Defendant in Error,

v.

WILLIAM SCHRAMM,

Plaintiff in Error,

WRIT OF ERROR

FROM CRIMINAL COURT

COOK COUNTY.

339 I.A. 143²

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

William Schramm was found guilty before a justice of the peace of selling alcoholic beverages to a minor in violation of an ordinance of the Village of Skokie. On appeal from that judgment he was found guilty by the Criminal Court of Cook County which assessed a fine of twenty-five dollars. No appeal was prosecuted. Several months afterward defendant filed a written motion in the nature of a writ of error coram nobis in the Criminal Court, praying that the judgment be vacated and set aside, which was denied. Defendant appealed directly to the Supreme Court of Illinois and there urged as grounds for reversal that the ordinance in question and the proceedings before the justice of the peace violated the state and federal constitutions. The Supreme Court transferred the cause to this court for the reason that the record contained no certificate by the trial court that the validity of an ordinance is involved and that the public interest requires a direct review by that court. (Village of Skokie v. Schramm, 402 Ill. 158.)

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8. 10. 1991

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* and *Agaricus bisporus* spores on the growth of *Agaricus bisporus*.

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the β phase of the polymer. The β phase is the more ordered phase and is characterized by a higher density and a higher melting point than the α phase. The β phase is also the more stable phase and is the one that is most commonly observed in nature. The α phase is the less ordered phase and is characterized by a lower density and a lower melting point than the β phase. The α phase is also the less stable phase and is the one that is most commonly observed in nature.

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthal and Whistler (1973).

Plaintiff contends that in the original proceeding the justice of the peace did not acquire jurisdiction of the person of the defendant because of the absence of a written complaint or affidavit naming the offense and the person charged with its commission.

An action by a village to recover a penalty for the violation of an ordinance is a civil suit and the rules applicable to criminal procedure have no application. (City of Chicago v. Williams, 254 Ill. 360; City of Chicago v. Knobel, 232 Ill. 112.)

The pleadings before a justice of the peace are oral (Zuel v. Bowen, 78 Ill. 234; Allen v. Nichols, Jr., 68 Ill. 250; Robien v. Kooie, 107 Ill. App. 219); and no written pleadings are required. (Village of Riverside v. Kuhne, 335 Ill. App. 547; Kibbat v. Clokey, 263 Ill. App. 410.)

Defendant also complains that no summons was issued in the proceeding before the justice of the peace. So far as the record shows, this objection was not raised before the justice of the peace or on the appeal before the Criminal Court. Moreover, by perfecting his appeal to that court any questions with respect to the service of process were waived and the court acquired jurisdiction of the defendant. (Wasson v. Cone, 86 Ill. 46.)

Defendant insists that the proof does not show that the liquor sold by him to a minor was intoxicating. The record shows that defendant stipulated as to the evidence introduced by the Village of Skokie in support of the

charge against defendant. The evidence discloses that a minor, aged seventeen, ordered "scotch and soda" which was consumed by the minor on the defendant's premises; that the minor had been drinking "hard liquor" for about a year; and that the scotch and soda sold by defendant to the minor tasted similar to the scotch and sodas he "had drank in the past year."

Whether the evidence warranted the finding that the liquor was intoxicating presented a question of fact which was determined adversely to defendant. The law is well established that the motion in the nature of a writ of coram nobis does not lie to determine a question of fact which has been adjudicated, even though decided wrongly, nor for alleged false testimony at the trial, nor for newly discovered evidence. . (People v. Tuohy, 397 Ill. 19; People v. Rave, 392 Ill. 435.)

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE AND KILEY, JJ. CONCUR.

44710

EUSEBIUS JAMES BIGGS and JAMES
WALSH,

Appellants,

v.

OSCAR E. HEWITT, Commissioner of
Public Works,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

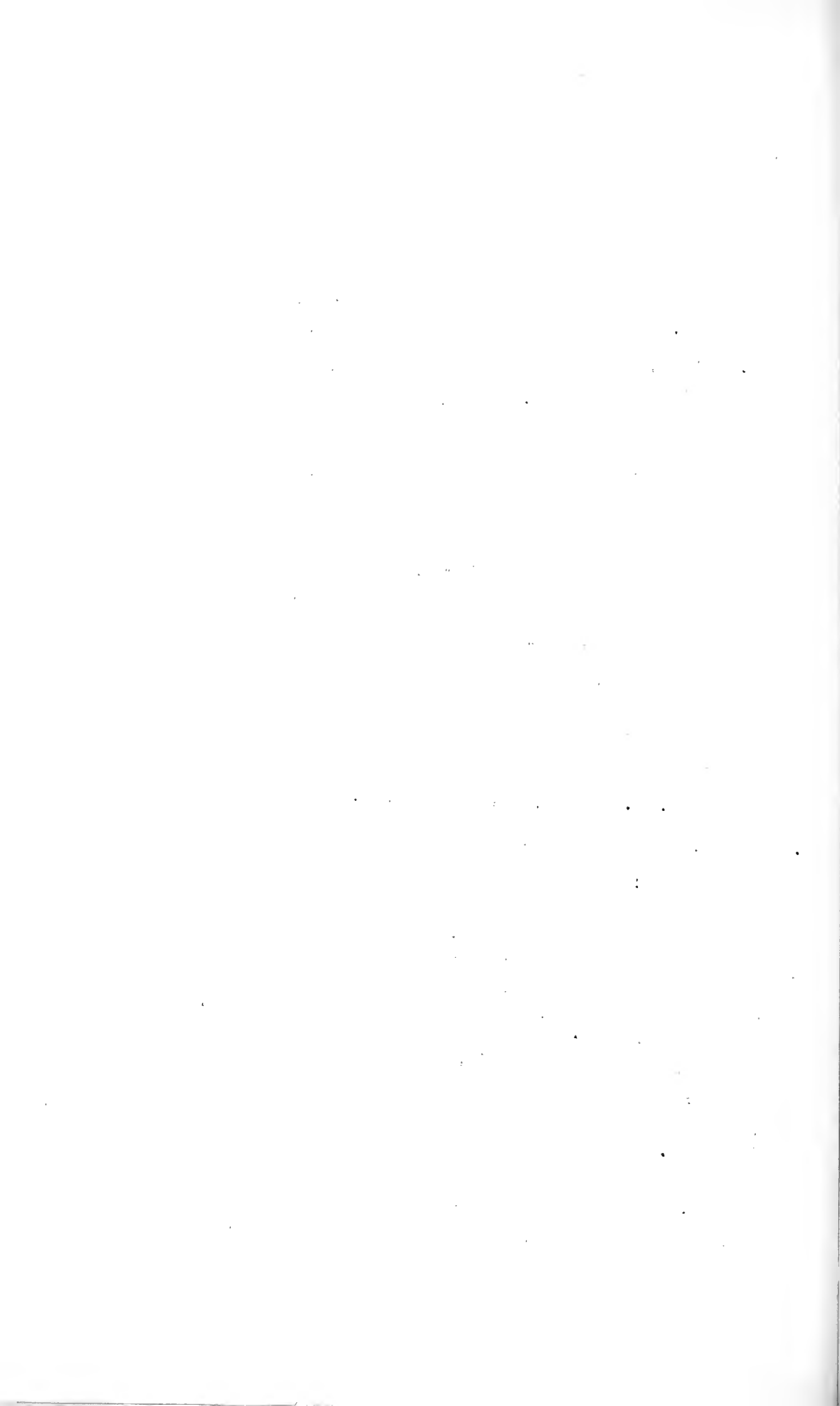
339 I.A. 144

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 31, 1948, Eusebius James Biggs and James Walsh filed a petition in the Superior Court of Cook County praying that a writ of mandamus issue within five days compelling the defendant "to instruct all his employees to be courteous to this plaintiff, and to answer questions relative to any item then material to the issue present, and that he be made to discharge from the employ of the City of Chicago" B. W. Cullen, one Goss, W. J. McCarthy and J. Garrity. On October 7, 1948, the court entered the following order:

"On motion of Eusebius J. Biggs that default be entered against defendant herein, alleged failure to file an answer to the second amended petition for writ of mandamus filed herein, and the court being fully advised in the premises, said motion is hereby denied. On motion of Oscar E. Hewitt that the second amended petition filed herein be stricken and the above cause dismissed and that parties having argued said motion in open court, and the court being fully advised in the premises, said motion to strike is hereby sustained, and it is ordered, adjudged and decreed that the above cause be dismissed."

Eusebius J. Biggs appealed from the order and asks that it be vacated, that the court enter judgment by default



2.

as requested, that plaintiffs may have other appropriate relief, and that they be allowed their costs. It appears that defendant filed a motion to dismiss. This notice, however, has not been incorporated in the record. The presumption is that the judgment of the trial court is correct and the burden rests on appellant to bring here a record ~~xxxx~~ which points out reversible error. In view of appellant's failure to bring the motion to strike or to dismiss, we assume that such motion was adequate under the provisions of the Civil Practice Act and the Rules of the Supreme Court.

The writ of mandamus is a summary writ issued from a court of competent jurisdiction commanding the officer to whom it is addressed to perform some specific duty which the relator is entitled of right to have performed and which the party owing the duty has failed to perform. It is an extraordinary remedy, and one petitioning for such writ must show a clear and undoubted right to the relief demanded. It is a high prerogative writ and not a writ of right but is to be awarded in the discretion of the court, and ought not to issue in any case unless the party applying for it shall show a clear legal right to have the thing sought to be done and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced. The writ is not granted as a matter of absolute right, and will only issue in cases where it appears under the law it ought to issue. The court will not order it in doubtful cases. See The People v. Board of Review, 351 Ill. 301; The People v. Allman,

3.

382 Ill. 156. The petition fails to show a clear legal right to the writ of mandamus. Appellant does not have a license as a master plumber from the City of Chicago. The trial court properly refused to assist him in his illegal attempt to conduct a plumbing business without a license.

The petition asks that the defendant instruct "all of his employees" to be courteous to the plaintiff, to answer questions relative to any item "then material to the issue present" and to discharge certain employees of the City. The defendant states that his subordinates should be courteous at all times. The defendant, admitting this, cannot by mandamus be ordered to instruct his subordinates to be courteous. People v. Dunne, 258 Ill. 441, 446. A writ of mandamus will not issue to direct the defendant to discharge from the employ of the City of Chicago certain of his subordinates. The determination of whether the defendant should or should not discharge certain of his subordinates is a discretionary act. A writ of mandamus will not issue to compel an administrative officer of a municipality to exercise his discretion in a particular manner. See Coughlin v. Chicago Park District, 364 Ill. 90; MacGregor v. Miller, 324 Ill. 113.

For the reasons stated, the judgment in the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, J., and
LEWE, P.J., CONCUR

44878

EUSEBIUS JAMES BIGGS, Individually,
as the assignee of Pipe Trades, Inc.,
a corporation, as the assignee of
the E. J. Biggs Construction Co., a
corporation, and as the assignee of
JAMES F. WALSH, an individual,

Appellant,

v.

THE CITY OF CHICAGO, MARTIN KENNELLY,
OSCAR E. HEWITT, and BENJAMIN
ADAMOWSKI,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

339 I.A. 145¹

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 1, 1948, Eusebius J. Biggs, individually, as the assignee of Pipe Trades, Inc., a corporation, as the assignee of the E. J. Biggs Construction Co., a corporation, and as assignee of James F. Walsh, an individual, filed his first amended complaint in the Superior Court of Cook County against the City of Chicago, Martin Kennelly, Oscar E. Hewitt and Benjamin Adamowski, reading as follows:

"1. That the defendant City of Chicago, Cook County, Illinois, is a Municipal Corporation duly organized and existing under and subject to an act to provide for the incorporation of cities and villages, approved April 10th, 1872, enforced July 1st, 1872, and all amendments thereof; that the defendant Martin Kennelly is the duly elected and qualified and acting Mayor in the said City of Chicago; that the defendant Oscar E. Hewitt is the duly appointed, qualified and acting Commissioner of Public Works of the said City of Chicago, and Benjamin Adamowski is the duly appointed, qualified and acting Corporation Counsel of the said City of Chicago.

"2. That the said City of Chicago is authorized by the State of Illinois to write, make and enforce a plumbing code by virtue of the authority set up in sections 103 and 104 of Chapter 111½ of the statutes of the State

of Illinois, which are sections of the statute covering Public Health, and they are known as part of the Plumbing license law, but they are still subject to the Constitution of the State of Illinois, and the Constitution of the United States of America with amendments thereto.

"3. That on or about July 1, 1939, the City Council for the said City of Chicago made an amendment to the Municipal Code for the said City of Chicago, which consists of chapters 82 and 83 of the Municipal Code of the City of Chicago, and combining these chapters with other chapters including one numbered 162, the various chapters are incorporated into one pamphlet, which is known as the Plumbing Code of Chicago.

"4. Chapter 111 $\frac{1}{2}$ of the Statutes of the State of Illinois permits any corporation to engage in the plumbing business in the State of Illinois, provided, 'at least one member thereof is continually and actively engaged in the conduct, supervision or performance of the firm, -- shall be a licensed Master plumber as provided in this act,' and it further states that a Master plumber licensed by the State of Illinois, as a Master plumber, can engage in the business of a Master plumber in an incorporated town having a population in excess of five hundred thousand or more inhabitants. The said chapter 111 $\frac{1}{2}$ also provides that, '---a corporation, authorized to engage in the plumbing business, can employ journeymen plumbers and plumbers apprentices.'

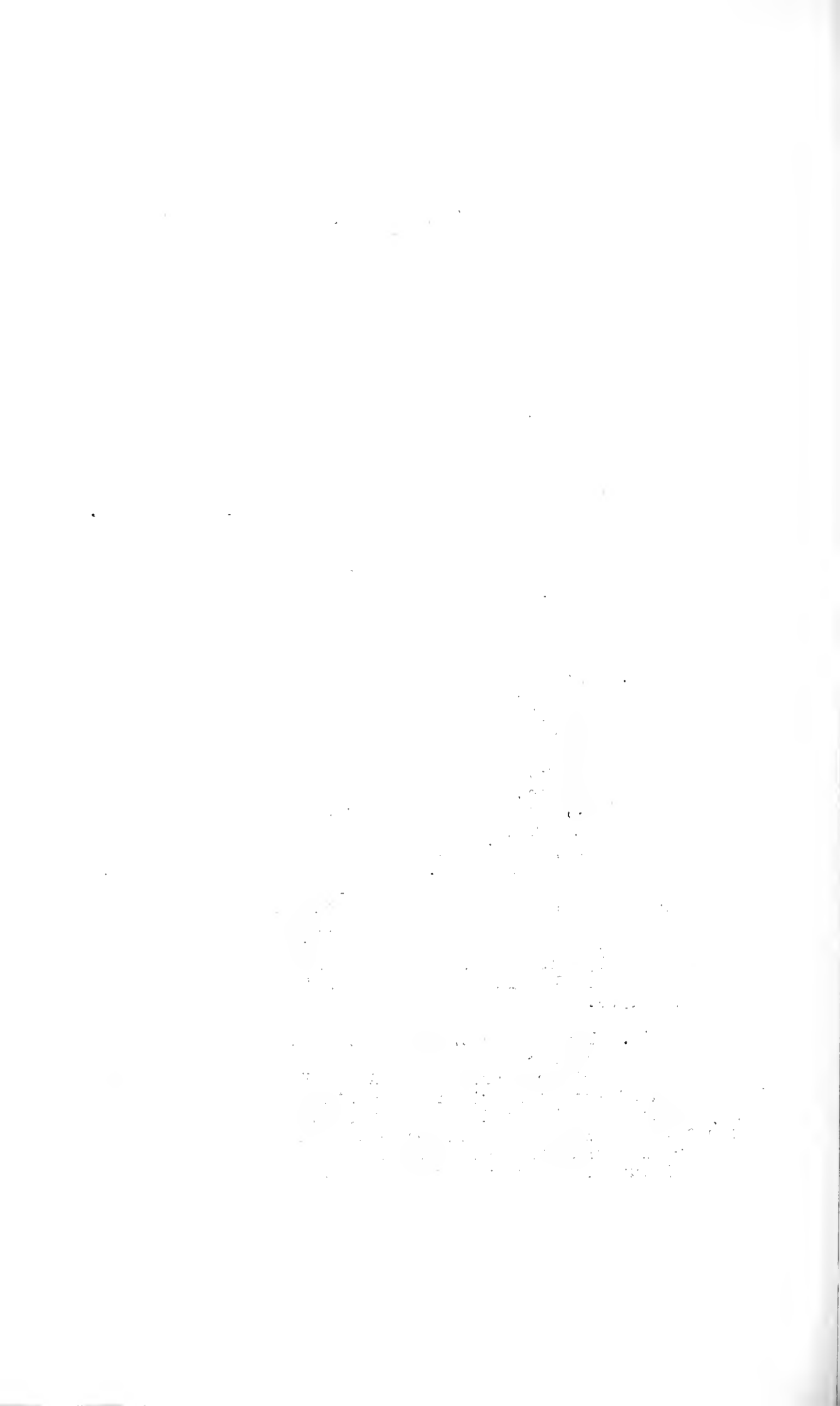
"5. That the plaintiff owns now, and has owned the business known as the Biggs Construction Co. (which is not incorporated), since the year 1920, which engages in the constructing of buildings and construction work of various kinds, which does not do a vast amount of work because in the years past the Chicago Journeymen Plumbers Local Union 130, whose members comprise for the most part all the inspection field staff covering all inspections that have to do with all chapters outlined heretofore and referred to as the Plumbing Code of Chicago, have heretofore and are now trying to deprive him of a livelihood, and speaking on information and belief, the subordinates of Oscar E. Hewitt, with his knowledge and consent, and the knowledge and consent of the other defendants, are committing the illegal acts which will be hereinafter set forth, for the sole purpose of destroying his business and reputation so that he will have to leave Chicago and live elsewhere.

"6. That in the year 1945, the plaintiff induced his relations and friends to organize a construction company which would bear his name, and they have secured a charter to engage in the construction business from the State of Illinois, and hold a certificate of incorporation number 1638, which is duly recorded in the recorders office of Cook County, Illinois as document No. 13597552.

"7. That in the years prior to 1945, the Chicago Journeymen Plumbers Local Union 130 and the Chicago Master Plumbers Association, working together have been able to and did paralyze the construction companies owned or controlled by this plaintiff by refusing to bid on the work of the plaintiff, or by chasing off the men who belonged to the Chicago Journeymen Plumbers Local Union 130 when they were employed by him or by licensed Master plumbers who did not belong to the Chicago Master Plumbers Association, said results being obtained by taking away the union cards of the men if they worked for, or on work which was being done for this plaintiff, and anticipating a repetition of the same tactics in the year 1946, this plaintiff induced other persons to join with Mrs. Biggs, and they organized a corporation to do among other things, engage in the plumbing business in the State of Illinois, and the said State knowingly has issued to this corporation, which is namely, Pipe Trades, Inc., charter No. 3326, which is recorded in Cook County, Illinois as document No. 13690821, and James F. Walsh is actively engaged as the Master Plumber of that corporation, is an active member of the said corporation, and directs the activities of the journeymen plumbers; and this plaintiff indirectly controls both corporations, which prevents the work stoppage caused in previous years by the parties heretofore referred to.

"8. That the two companies, who hold a common office at 8536 South Peoria Street, Chicago, Illinois, and whose finances are controlled by this plaintiff, prior to June 10, 1948, had a payroll in excess of \$100,000.00 a year, and did a volume of business in one year in excess of \$250,000.00, and they employed over 60 men, which included up to 7 men from the Chicago Journeymen Plumbers Local Union 130, and Pipe Trades, Inc., was a going concern, doing plumbing work in Chicago, by and with the consent of the Board of Examiners of Master plumbers, who in the years 1946, 1947 and 1948 issued credentials to James F. Walsh and Pipe Trades, Inc., which permits them to obtain permits for the installation now of plumbing work under the provisions of Chapter 82 of the Municipal code of Chicago, and by virtue of permits issued by the building department they are now installing plumbing work in buildings, which is being inspected and passed on by the plumbing inspectors of the City of Chicago as of this date.

"9. That in order to do plumbing work in the City of Chicago, it is necessary that two permits be secured, which are commonly referred to as A and B permits, the first being secured from the building department, where a fee is paid, plans are submitted that must stand inspection, and after this permit to install fixtures and doing the necessary pipe work in connection with the installation of the venting of the fixtures, before water can go to these fixtures another



plan must be submitted to the Department of Public Works, in accordance with chapter 83 of the Municipal Code of Chicago, and within this department under the authority of chapters 85 and 185 of the Municipal code of Chicago, exists another department which handles a separate connection to the refrigeration system or air conditioning systems, while still another section of the chapters that go to make up the so called Plumbing Code of Chicago makes it mandatory to obtain a sewer permit; and with each permit there is a requirement that the work be inspected on an average of two times, and said inspections are made by four members of the Chicago Journeymen Plumbers Local Union 130, who drive to the particular site of the work in separate cars at times, and at other times they arrive in the same car, which sometimes results in inspection permit costs in excess of the value of the work done, and the provisions of the ordinance that make this requirement necessary are unreasonable and unconstitutional in that the ordinance is written primarily to make work for members of the Chicago Journeymen Plumber s Local Union 130, which is prohibited by the Constitution of the United States of America with amendments thereto, and this duplication of inspection at the same site and location at the site add nothing to the safety and health of this plaintiff or any other citizen of Chicago, and causes irreparable harm to the taxpayers.

"10. This plaintiff can as of this date, go before the plumbing division of the building department and with the credentials issued in October, 1948 by the Board of Examiners of Master Plumbers of the City of Chicago, and that department will issue permits to James Walsh to install plumbing fixtures, and he can write to the Building Department in reference to plumbing on the stationery of Pipe Trades, Inc., and he will receive an answer and at all times he is treated courteously by the employees of the City of Chicago, and he has received communications from the Department of Public Works addressed to Pipe Trades, Inc. bearing the stamped signature of Oscar E. Hewitt, B. W. Cullen and W. W. DeBerard, the latter two being subordinates of Oscar E. Hewitt, from the division which operates under chapter 183 of the Municipal Code of Chicago, but any communication sent to the Public Works Department of the City of Chicago, the division which operates under chapter 83 of the Municipal code of Chicago, on the stationery of Pipe Trades, Inc., is never answered, and when attempts are made to secure permits in the Water Department by any employee of Pipe Trades, Inc., other than James F. Walsh, on the rare occasion when they were issued, they were issued to this plaintiff with insults and abuse, and have been refused with a lot of abuse, in which this plaintiff was called a liar, and referred to as a goof by an employee of the City of Chicago, and this denial of courtesy and permits is approved by the defendants, because there is no provision in the Plumbing code of the City of Chicago, that allows a corporation to engage in the plumbing business, which is permitted

by the State of Illinois in Chicago under the Statute 111 $\frac{1}{2}$ of the State of Illinois heretofore referred to; that at the present time there are numerous other corporations actively engaged in the plumbing businesses in Chicago, who obtain permits thru their employees, who are all ages and both genders, and the acts set forth are discrimination against this plaintiff which has for its purpose, the destruction of Pipe Trades, Inc., so that this plaintiff will have to leave Chicago to earn a livelihood; and the City of Chicago is without authority to stop any corporation from engaging in the plumbing industry in Chicago, because the provisions of the Illinois statute 111 $\frac{1}{2}$ heretofore mentioned permit a corporation to operate anywhere in Illinois, including Chicago.

"11. That the City of Chicago, thru Oscar E. Hewitt, by and with the consent of the other defendants, is now refusing to issue B permits, to connect water service from the city main to pipes now installed in buildings built by the Biggs Construction Co., because the plumbing work was sublet to Pipe Trades, Inc., altho James F. Walsh and this plaintiff have repeatedly submitted plans and applied for B permits, and these plans have been inspected and declared to be in good order, satisfying the provisions of chapter 83 of the Chicago Municipal Code, by persons authorized to pass on them, the permits are refused because a stop order has been issued against all B permits that James F. Walsh applies for, in that section of the Public Works Department operating under Section 83 of the Municipal Code of Chicago, until such time as James F. Walsh complies with a demand made by B. W. Cullen which is attached to the original complaint as exhibit C., which is to be considered as Exhibit C here, and the demand set forth that James F. Walsh remove the check and waste will never be complied with by Pipe Trades, Inc., or James Walsh, because the owner of the premises and the City of Chicago falsely informed this plaintiff and James F. Walsh that there was a 1" service to the building mentioned in Exhibits A, B, C of the original complaint, all exhibits of which are to be considered as Exhibits A, B and C of this complaint, and Pipe Trades, Inc., who were the plumbing contractors on this job, have completed their work in its entirety in accordance with the plans they submitted to the Public Works Department, thru James Walsh, they have complied with all the legal demands made in Exhibit A, and exercising their prerogative granted them by the Constitution of the United States of America with amendments thereto, they decline to recognize that the City of Chicago and other defendants can make them enter into new contracts with the owner of the premises mentioned in the exhibit; that in all the chapters of the so-called Plumbing Code of Chicago, there are provisions for the punishing of violations of all sections of the entire code, which is created by statute and the defendants cannot legally stop the issuance of B permits to a Master plumber

when the plans are correct; the defendants are without authority to enlarge or add to any city ordinance, and there is no ordinance that provides for the non-issuing of B permits, and the refusal to issue B permits is an illegal act, which has for its purpose the destruction of the business controlled by this plaintiff.

"12. That the defendants fully understand and acknowledge that in order to safeguard the health of the citizens of Chicago, that a Department of Public Works is maintained which is staffed by professional engineers, and they are cognizant of the fact that men who are so illiterate that they cannot sign their own name could never keep up with the rapidly changing requirements of the Plumbing Code of Chicago, but notwithstanding, under the provisions of the Plumbing Code of Chicago, members of the Chicago Journeymen Plumbers Local Union 130 or their friends can obtain licenses as Master plumbers altho they cannot sign their own names, because they can have Master Plumbers in Chicago attest to their ability to be journeymen, and they are and have been barring this plaintiff from obtaining a license as a Master plumber, knowing full well that he holds a Master plumbers license in Indiana, is a registered professional engineer holding license No. 6489, issued by the State of Illinois, and has employed plumbers in Illinois for 15 years, solely because he has not worked for a Master plumber in Chicago as a journeyman, and will not practice to do one item of work which he has no intention of doing, they can bar him because under the provisions of chapter 162 of the Municipal Code of Chicago, Chicago Journeymen Plumbers Local Union 130 can and does make the rules as to how the applicants for Master plumbers licenses shall be judged, and on what they shall be judged, and said requirements for the licensing of Master plumbers are unreasonable, and detrimental to the health of the citizens of Chicago, which includes this plaintiff, and are being enforced against this plaintiff.

"13. That the statements made by the signers in Exhibit A relative to items of major importance are utterly untrue and false, and the statement that a 3/4" pipe has been installed and was being replaced was and is a deliberate misstatement, as the defendant Oscar E. Hewitt was informed that as long as he objected to making a connection with the 5/8" service, which this plaintiff believes is a 3/4", this plaintiff, as agent of Pipe Trades, Inc. would cut off the connection Oscar E. Hewitt claimed was a violation of the Plumbing Code of Chicago, and leave it off until such time as the City of Chicago put the 1" service in they said was there, and then not until the owner put in the 1" service he said was there, which has not been done, and hence this plaintiff or his assignors will not reconnect the pipe in any way with any materials, and cannot be legally made to make the connection until such time as the City of Chicago and the owner put in the 1" service.

"14. That on June 10, 1948, at the premises known as 2330 W. 111th Street, the only complaint made of the plumbing installation to the E. J. Biggs Construction Co., plaintiff assignor, by the defendants was that James Walsh had connected the new plumbing fixtures to the service then in the building, and in so doing there was not and could never be anything that would interfere with the health and safety of the citizens of Chicago, but immediately after the connecting pipe was removed, it was connected together again with a garden hose by persons unknown to this plaintiff, and said hose has broken on many occasions, and been replaced by the owner, and as of this writing of this complaint said hose is still the only connection to plumbing fixtures used by up to 4 barbers, who use the water going thru the hose to wash the faces of all the customers who have work done in the shop, and any ordinance which permits the plaintiff to deprive anyone of his livelihood because he makes a sanitary connection, which complied with the statute, to a water service, and permits an unsanitary connection to be made and maintained, is discriminatory and in violation of both the Constitution of the State of Illinois and that of the Constitution of the United States of America with amendments thereto, and if there is no provision in the ordinance which allows this discrimination, the defendants have and are discriminating against the plaintiff, and are causing him a large financial loss.

"15. That the demand of B. W. Cullen on Exhibit B that the Master plumber for Pipe Trades, Inc. make an isometric drawing and that he show a 1" service to the street main, cannot be enforced as there is no provision in the chapter 83 of the Municipal Code of Chicago, nor can there be one which will let the said B. W. Cullen specify that this plaintiff's assignor, or anyone else will draw the type of drawing that B. W. Cullen wants, nor can the said B. W. Cullen violate the Constitution of the United States of America with amendments thereto and tell this plaintiff or anyone else what he will put on any drawing unless that party was going to do the work, and was going to be paid for it, and having informed the defendant Hewitt we would not work on the service, the defendants cannot cut off the permits to James Walsh which affects all the assignor companies because they refuse to comply with B. W. Cullen's illegal demands.

"16. That the City of Chicago being created by statute, cannot transcend the authority granted it, and nowhere in any statute of the State of Illinois, or in any Federal statute can it find authority to create a monopoly, and the provisions of the Plumbing Code of Chicago, which prohibits a journeyman plumber from holding a Master plumbers license, while he holds a journeyman license, adds nothing to the health and safety of the City of Chicago, and the sole purpose of this provision is to make it impossible for a member of the Chicago Journeymen Plumbers Local Union 130 to engage in the plumbing business, and prevents them from doing small repair work for the citizens of Chicago,

so that the Master Plumbers can make a profit.

"17. That the demands of B. W. Cullen and others as set forth in Exhibits A, B, C, and Exhibit E, which has been heretofore filed with the petition for a temporary writ of injunction, (said Exhibit E being made a part of this complaint herewith,) that a new service be installed is unreasonable, and not in any way necessary to safeguard the health of the citizens of Chicago, as under the provisions of Chapter 83, paragraph 46, the owner of said premises could install a pump and increase the pressure if it was needed, and said offer was made by this plaintiff prior to June 10, 1948, but in this case it was not needed, and the demands made in Exhibits A, B and C were not made for a legal purpose, but were made to demonstrate that B. W. Cullen and members of the Chicago Journeymen Plumbers Local Union 130 can tie up any contractor, and deprive him of a livelihood, and the demands made on James Walsh were not made in good faith to achieve a lawful objective, but were directly aimed at ruining the businesses which this plaintiff controls.

"18. That the entire Plumbing Code of Chicago in its various chapters grants authority to the administrator of that department to make rules to enforce that particular ordinance of the City of Chicago, and in some of the chapters of the Plumbing Code it calls for items to be installed of an approved type, and under these two provisions members of the Chicago Journeymen Plumbers Local Union 130, who control the inspection of the plumbing work in Chicago, are able to, and do, change the rules overnight, and a type of valve installed legally in plumbing work on one day by this plaintiff or plaintiff assignor is illegal the next, and depending on which section of the City of Chicago the plumbing contractor is doing his work, the installation is legal or illegal depending not on any ordinance, but on which member of the Chicago Journeymen Plumbers Local Union 130 inspects the work, and work approved by one inspector at the address mentioned in the exhibits is disapproved by another, and said actions cannot be construed as being necessary to the health and safety of the citizens of Chicago, but are acts without any legal authority, and are unreasonable, and in this case were committed to cause a financial loss to this plaintiff.

"19. That the Department of Public Works which operates under chapter 83 of the Municipal Code of Chicago is supposedly run by the defendant Oscar E. Hewitt, and the law so provides, but the said Oscar E. Hewitt does not control the actions of his subordinates, who take and receive their orders from the Chicago Journeymen Plumbers Local Union 130, said orders coming directly or indirectly to those members who have openly defied Oscar E. Hewitt in the presence of this plaintiff, refusing to comply with the intent and purpose

of the Plumbing Code of Chicago, and who adhered to a policy of, we can get away with it on this technicality, they manufacture violations that do not exist, they falsify reports about Pipe Trade, Inc., both as a matter of record and to the general public, and any ordinance so written that it can be construed in that light, is unreasonable and a menace to the public health and safety, and cannot be enforced, and they have done and are doing irreparable harm to this plaintiff.

"20. That all sections of the Plumbing Code of Chicago, and in particular chapters 82 and 83 which have to do with the sizes of pipe, are not written for the public health and safety, but are written to make work for the members of the Chicago Journeymen Plumbers Local Union 130 primarily, and the citizens of Chicago have to pay for the installation of unnecessary pipe and unnecessarily large pipe, for which they receive no benefit whatsoever, but the sections of the ordinance of the City of Chicago are so written so that the Chicago Journeymen Plumbers Local Union 130 can enforce its edict that two men shall work, where one man would suffice, and those sections of the Municipal Code of Chicago which creates this condition are unreasonable, and the City of Chicago is without authority to write such an ordinance, as this type of legislation is prohibited by the Constitution of the United States of America with amendments thereto, and the Constitution of the State of Illinois as amended.

"21. That in making the demand on the plaintiff assignor James Walsh that they install a new service on the premises as set forth in the Exhibit A, and denying permits to the plaintiff assignor because said service was not installed as of June 10, 1948, and subsequently making an agreement with the owner of the premises to install the service one year later, sets forth that the defendants have judicial authority under the Plumbing Code of Chicago as now written, and the City of Chicago cannot write or enforce an ordinance, which delegates powers to the Administrator of Public Works, which are reserved to the courts under the Constitution of the United States of America with amendments thereto, and an ordinance so written is void and cannot be enforced.

"22. That due to the illegal refusal of the defendant Hewitt to issue permits to James F. Walsh, and the dilatory and delaying tactics of the subordinates of the defendant Benjamin Adamowski, by and with his consent, which has prevented a court decision in this issue for five months, which has also been permitted by the defendant Martin Kennelly, the employees now employed by the construction companies and Pipe Trades, Inc. have decreased so that at this time they have 26 employees, instead of the normal 60,

which they would otherwise have had, and if the illegal acts of the defendants are allowed to continue, in a period of about 90 days all activities of all companies will come to a standstill, and at the present time, due to the illegal activities of the defendants, this plaintiff is losing approximately \$200.00 per day, and has lost about \$25,000.00 since the defendants refused to issue permits to James Walsh, and with the decline in jobs going, the advertising he received thru the various companies is lost and his losses will increase, and at the end of 90 days his losses will exceed \$500.00 per day; that the defendants exclusive of the City of Chicago, speaking on information and belief, do not have in their own right, the sums of money which they will owe to this plaintiff, if they are allowed to continue to refuse B permits to this plaintiff or his assignor thru James Walsh, nor will those members of the Chicago Journeymen Plumbers Local Union 130 have sufficient funds to reimburse this plaintiff for his losses, and therefore there can be no adequate remedy at law for this plaintiff or his assignor.

"23. That the stated capital of Pipe Trades, Inc., and the E. J. Biggs Construction Co. is \$3,000.00, and they require and receive from this plaintiff credit up to \$50,000.00, and in order to protect this credit, and in consideration of \$1.00 paid to them, this plaintiff holds an assignment from James F. Walsh, Pipe Trades, Inc., and the E. J. Biggs Construction Co. properly executed, which assigns this chose in action to him, and all sums that will become due from these defendants have been assigned to this plaintiff, in the same instruments, said assignments being executed on September 4, 1948, in the City of Chicago, Illinois.

"24. Wherefore, plaintiff prays judgment that said City of Chicago, Martin Kennelly, Mayor of the said city, Oscar E. Hewitt, Commissioner of Public Works, Benjamin Adamowski, Corporation Counsel, and their agents, servants and employees, and all persons acting under their control, authority and direction, may be restrained and enjoined by the injunction of this court from harassing and annoying this plaintiff, from cooperating with the Chicago Journeymen Plumbers Local Union 130, from interfering with the normal procedure as to plumbing permits in any company with which this plaintiff is affiliated, from making up supposed violations of sections of the Plumbing Code of Chicago, from giving fraudulent information to this plaintiff or any of his assignors as to the size of service then installed, from making illegal demands on this plaintiff or his assignors, from attempting to deprive this plaintiff and his assignors of his property without due process of law, and from enforcing all chapters of the Plumbing Code of Chicago, which comprise chapter 82, 83 and 162 and other chapters of the Municipal Code of Chicago, which are in force and effect at this time,

and from attempting to enforce said Plumbing Code and from beginning, instituting or prosecuting suits, actions, proceedings, quasi-criminal or otherwise, under any chapter, sections or any or either thereof, or because of any failure or supposed failure to procure a permit under any sections, or pay the permit fees, or any thereof required to be paid under the terms of any sections, or any or either thereof, and that said defendants and all persons acting under their control, authority and directions be enjoined from taking any person into custody under said sections or because of any violation or alleged violation of said sections, and from arresting or attempting to arrest any person or persons, under or because of said sections, or any or either thereof, for any violation or alleged violation of said sections, or from prosecuting any suit or suits heretofore instituted under said sections, and plaintiff prays that upon the final hearing of this cause the court will grant a permanent injunction, forever restraining and enjoining said defendants, and each of them, and their servants, agents and employees, and all persons acting under their control, authority or direction, from doing or attempting to do any of the things above mentioned, and that said Plumbing Code of Chicago, which is composed of chapters 82, 83 and 162 and other chapters of the Municipal Code of Chicago may be declared to be unreasonable and unconstitutional; and that plaintiff may have such other and further relief as may be just and equitable, except those items stated on information and belief, which he believes to be true."

Attached to this complaint as exhibits are the following;

"Mr. J. F. Walsh
8536 S. Peoria Street
Chicago, Illinois

Exhibit A
Re: 2330 W. 111th Street

Dear Sir:

An inspection of the above premises on June 23, 1948 and the work performed under permit #32122 issued by the Bureau of Water on July 30, 1947 according to plan which had been submitted and approved disclosed the following facts:

A 5/8" lead service pipe and 5/8" meter was existent and not a 1" service pipe and 1" meter as shown on plan.

A 3/4" galvanized pipe had been installed, connected to the old supply pipe and extended to the new fixtures. This pipe was being replaced with 1" galvanized pipe at the time of inspection. The water had been turned off and there was no water supply to these fixtures.

The permit as issued was for the installation of five additional fixtures only. Seven have been installed.

An unapproved ball cock had been installed in the new water closet and no air chambers had been installed on the supply pipe for the new shower stall.

You were notified on April 21, 1948 and again on May 22, 1948 to make the plumbing installation as required by your permit and warned that unless you did comply in ten days no future permits would be granted you.

On June 10, 1948 the permit clerk was notified not to issue permits until compliance was secured.

You are now notified to present a supplementary plan, make application and secure a permit for the two additional fixtures which you installed and correct the violations listed above in the work you have done.

When you have complied with this notice and have installed a control valve on the present service pipe above the ground in place of the underground check and waste valve now in place, consideration may be given for a request for extension of time to replace the inadequate 5/8" service pipe with a 1" pipe as shown on approved plan.

Yours truly,
O. E. Hewitt
Commissioner of Public Works"

"Mr. J. F. Walsh
8536 South Peoria Street
Chicago, Illinois

Exhibit B July 21, 1948

Dear Sir:

Re: 2330 West 111th Street

At the conclusion of the conference held in Commissioner Hewitt's office this morning you were given the following information:

An isometric drawing must be submitted in duplicate showing the water supply piping to all fixtures including the 1" lead service pipe from street main.

A letter should accompany the plan stating that all other violations have been abated and the present 5/8" service pipe would be replaced on or before June 1st, 1949.

The plan and letter should be submitted to the plan examiner in the Bureau of Water with an application for a supplementary 'B' permit.

When the above conditions have been met you will again be allowed to take out permits for installation and connection to the city water supply piping.

Yours truly,
B. W. Cullen
Supt. of Water Pipe Extension"

"Mr. W. B. Cullen, Exhibit C August 31, 1948
Superintendent of Water Pipe Extension
City of Chicago

Dear Sir: Re: 2330 West 111th Street

I hereby agree to remove 5/8 inch check and waste cock and install a control valve above the floor on the present 5/8 inch water service pipe; also to provide and make a permanent connection between the one inch galvanized pipe supplying water to the fixtures and the present 5/8 inch metered service pipe, this work to be done before September 4th, and in consideration of which I request the release of my permits.

Yours very truly,"

"E. J. Biggs Construction Co., Exhibit E Apr. 29, 1948
8536 South Peoria Street
Chicago, Illinois

Gentlemen: Re: 2330 W. 111th Street

Your letter of April 13, 1948, addressed to the Commissioner of Public Works has been referred to the Water Pipe Extension Division and in reply you are advised as follows:

A permit was issued to J. F. Walsh to install five (5) fixtures as shown on plan which was approved. The plan also showed an existing one (1) inch metered service which is adequate to supply the additional fixtures.

Our inspector reports there has been seven (7) fixtures installed in addition to the five (5) fixtures in the old building and all twelve (12) fixtures are being supplied through a 5/8 inch metered service. This 5/8 inch service will not supply sufficient water and must be replaced with a one (1) inch service.

The installation of a pump on the present 5/8 inch service would not correct the deficiency in the volume of water required. Mr. Walsh has been notified verbally by the field inspector to complete the installation according to the approved plan in compliance with the condition under which the permit was issued.

Yours truly,
B. W. Cullen
Supt. Water Pipe Extension"

Defendants filed the following motion to strike
the first amended complaint and to dismiss the cause:

"1. The plaintiff Eusebius James Biggs has joined himself as party plaintiff with himself as the assignee of Pipe Trades, Inc., E. J. Biggs Construction Co. a corp., and James F. Walsh, an individual. Said complaint does not set up any facts concerning the said alleged assignments which would indicate that if the said Pipe Trades, Inc., E. J. Biggs Construction Co., a Corp. and James F. Walsh, an individual, had any rights in the premises or had any rights which would entitle them or any of them to relief such as that prayed for, or that they or either of them assigned those rights to the plaintiff, Eusebius James Biggs.

"2. The complaint filed herein does not set up any allegations of fact which indicate that the plaintiff, Eusebius James Biggs, as an individual has a right which is being interfered with by any or all of the defendants herein to engage in the business of a Master Plumber for which interference the defendants or any of them should be enjoined as prayed.

"3. The complaint filed herein does not set up any allegations of fact which would indicate that Pipe Trades, Inc., E. J. Biggs Construction Co., a Corp., and James F. Walsh, an individual or any or either of them or Eusebius Biggs, as their assignee have any rights to engage in the business of Master Plumber which are being interfered with by any or all of the defendants herein to the extent that an injunction issue against said defendants as prayed for in said complaint. Section 95 of said Act is entitled 'Plumbing License Law.' Sec. 103 of said Act reads as follows: 'Any City, village or incorporated town having a population of five hundred thousand or more, may, by ordinance, provide for a board of plumbing examiners to conduct examinations for journeyman plumbers and master plumbers, to register plumbers' apprentices, and to issue and revoke plumbers' licenses within such city, village or incorporated town. The provisions of this Act except as otherwise herein provided, shall not apply within any such city, village or incorporated town which enacts such ordinance. Any person authorized under the provisions of this section to engage as a master plumber or journeyman plumber in any such city, village or incorporated town is authorized to engage as a master plumber or journeyman plumber anywhere in this State. Nothing contained in this act shall prohibit any city, village or incorporated town from providing for a plumber inspector or from requiring permits for the installation and repair of plumbing and collecting a fee therefor.'

"Pursuant to said act there is now in full force and effect in the City of Chicago, ordinances duly passed by the City Council of the City of Chicago and incorporated in the Municipal Code of the City of Chicago, designed to regulate

plumbing installations within the City of Chicago, in keeping with the spirit and intent of sections 103 and 104 of Chapter 111 $\frac{1}{2}$ of the Statutes of the State of Illinois, aforesaid, as follows: Chapter 162 of the Municipal Code of Chicago provides among other things who may engage in the business or occupation of master plumber, journeyman plumber and plumbers' apprentice and under what conditions they may so engage. Section 1 of said chapter defines the term 'master plumber' as follows: 'The term "master plumber" is hereby defined to mean a person duly certified as such and authorized to engage in the installation of plumbing, through contract or otherwise, and also in planning, engineering, superintending, installation, maintenance, and repair with respect to plumbing in all its branches, and as such master plumber is authorized to employ journeyman plumbers and plumbers' apprentices and other persons necessary for the proper installation of plumbing work in accordance with the plumbing regulations and provisions of this code.'

"Nowhere in said chapter, or for that matter anywhere in the Municipal Code of Chicago is it provided that a corporation, or an agent for a corporation, as such, or an assignee of a corporation can engage in the business or occupation of master plumber.

"Chapter 82 of the Municipal Code of the City of Chicago is entitled 'Plumbing Provisions.' This chapter contains 153 sections regulating plumbing installations including 'General Provisions,' 'Regulations,' 'Materials,' 'House Drains and Sewers,' 'Roof, Storm Water and Seepage Drains,' 'Soil, Waste and vent pipes,' 'catch basins, traps, and cleanouts,' 'Plumbing Fixtures,' 'Joints, connections and fittings,' 'Inspection test of Plumbing and Drainage Systems,' and penalties for violations of chapter provisions. Sec. 3 of said chapter 82, among other things, provides: 'No person shall construct, add to, alter, or use any part of a plumbing system within building, public or private until plans have been examined and approved by the department of public works, department of buildings, and other authorized departments, and a permit is issued and the fee paid.' Sec. 6 of said chapter 82, among other things provides: 'The approval by the department of buildings, department of public works, and other authorized departments shall be stamped and dated upon the required plans of every plumbing system, and this approval, together with the receipt for payment of fees shall constitute the permit required for such work. No permit shall be issued for the installation of plumbing except to a licensed master plumber, licensed architect, or a licensed structural engineer.' Sec. 7 of said chapter 82 among other things provides: 'No plumbing installed in violation of this code shall be approved by any department. Except as otherwise provided in Section -82-3 for minor repairs, the department of buildings or the commissioner of public works shall not approve any plumbing work installed unless the master plumber installing such work has in effect a certificate as a master plumber.'

"Chapter 83 of the Municipal Code of Chicago is entitled 'Water Supply and Distribution Systems.' It contains 71 sections designed to regulate the installation and operation of every kind of a device which has to do with the flowing of city water from the city supply pipes and in all of its provisions is meant to protect the health and safety of all persons who come in contact with city water as it leaves the last plumbing opening in the connecting chain of pipes to the city supply source. Section 1 of Chapter 83 provides: 'The provisions of this code for installation in any building or structure in the city of any water pipe or pipes or system of water piping which receives or is intended to receive its service from the Chicago water works system shall be administered and enforced by the department of Public Works.' Sec. 7 of said Chapter 83 provides: 'No permit shall be issued by the department of public works to any person for the installation of any service or supply pipe in the public ways, or other public places in the city; or for the alteration, extension, installation or repair of any service pipe or any system of water supply piping in connection with any plumbing system in any building, structure, or premises where such pipe or system of piping is connected, or intended for connection, to the pipes of the Chicago water works system unless such person be duly licensed and bonded as a qualified master plumber.'

"Said first amended complaint does not contain allegations of fact from which the court can draw an inference or conclusion that the plaintiff Eusebius James Biggs, individually, or the plaintiff Eusebius James Biggs, as the assignee of Pipe Trades, Inc., E. J. Biggs Construction Co. a Corp. and of James Walsh, an individual, have acquired any rights under the laws of the State of Illinois and the ordinances of the City of Chicago as above recited which entitle them or either of them to engage in the business or occupation of plumbers, either as master plumbers, journeyman plumbers, plumbers' apprentices or in any other capacity which would entitle them or either of them to the relief against the defendants or any of them as prayed.

"5. Said first amended complaint by paragraphs 2, 7 and 10 admits that the plaintiffs are not qualified as plumbers in any capacity under the laws of the State of Illinois and the ordinances of the City of Chicago and by reason of said admissions the court has nothing in said complaint from which to draw an inference or conclusion upon which to base a decree for injunction against the defendants or any of them as prayed in said complaint.

"6. Paragraph 11 of said first amended complaint makes allegations concerning alleged correspondence between the Department of Public Works and one James F. Walsh in re a plumbing installation at 2330 W. 131st St., Chicago,

Illinois, purported copies of said correspondence being referred to in said amended complaint as being attached as exhibits A, B and C to the original complaint filed herein, (exhibit C being unsigned). The said James F. Walsh is not a party to this suit, nor are there sufficient allegations in said first amended complaint from which the court can draw an inference or conclusion that the plaintiffs, Eusebius James Biggs, individually, or Eusebius James Biggs, as assignee of Pipe Trades, Inc., E. J. Biggs Construction Co., a Corp., or of James F. Walsh, an individual or either of them acquired any rights from James F. Walsh to enable them or either of them to engage in the business or occupation of plumbers in the installation of plumbing in the City of Chicago in any capacity under the laws of the State of Illinois and the ordinances of the City of Chicago as above recited so that the court can consider said paragraph 11 and base thereon a decree for injunction against these defendants or any of them as prayed.

"7. Most of the allegations contained in said first amended complaint and other allegations concerning the constitutionality of the laws and statutes of the State of Illinois and the ordinances of the City of Chicago are an incoherent, confusing hodgepodge of mere conclusions of law as interpreted by the pleader and contain no allegations of fact, bearing on the rights of plaintiffs, nor on the duties of the defendants nor upon the right of the General Assembly of the State of Illinois to enact legislation and to empower the City of Chicago through its proper authorities to pass ordinances which are designed to promote and protect the public health, safety, comfort, morals and public welfare, upon which the court can consider any issues attempted by said first amended complaint to be raised nor consider the constitutionality of the laws and statutes of the State of Illinois and the ordinances of the City of Chicago as they are pertinent herein, upon which the court can enter a decree for injunction against these defendants or any of them as prayed.

"8. The allegations of said first amended complaint taken together are ambiguous, confusing, conflicting, incoherent, broad, vague and indefinite and do not set up a cause of action."

On December 20, 1948, the court entered the following order:

"On motion of defendant City of Chicago that the first amended complaint filed herein be stricken, the motion for temporary injunction be denied and the suit be dismissed, and the court being fully advised in the premises doeth find:

(1) That the plumbing code of the City of Chicago, as a matter of law, is not unconstitutional. (2) That the complaint herein does not set up a cause of action. It is therefore ordered, adjudged and decreed that the first amended complaint filed herein be and the cause is hereby stricken, that the motion of plaintiff for a temporary injunction as prayed be and the same is hereby denied, and the motion of plaintiff for leave to file document marked exhibit 9 of Dec. 26, 1948, be and the same is hereby denied, that the suit filed herein be and the same is hereby dismissed for want of equity at plaintiff's costs."

Eusebius James Biggs filed a notice of appeal to the Supreme Court and asked that the order be vacated, that judgment be rendered in his behalf in accordance with the prayer of the first amended complaint, that the Supreme Court make a special finding that the motion to strike the first amended complaint does not comply with the rules of the Illinois Civil Practice Act, that defendants pay all expenses of plaintiff "to prove that fact," and that plaintiff have other appropriate relief. On May 10, 1949, the Supreme Court found that the case was wrongfully appealed to that court and transferred it here.

As his first point plaintiff urges that the trial court could not consider the motion to strike and dismiss because it did not comply with the Civil Practice Act and the Rules of the Supreme Court. We have examined the written motion filed by defendants and are of the opinion that it properly presented all of the points urged in the trial court and in this court. Secondly, plaintiff asserts that defendants' motion admits all the facts well pleaded. This statement is not disputed. As a third point, plaintiff maintains that having challenged the validity of the ordinances which make

up the "so-called Chicago Plumbing Code" along with acts of discrimination against him and the assignor companies, that he is entitled to a trial on these matters. Plaintiff's attack on the ordinances was based on his contention that certain provisions violated the State and Federal Constitutions. Constitutional questions are not within the jurisdiction of this court. See Village of Lake Zurich v. Deschauer, 310 Ill. 209; City of Chicago v. Sayer, 330 Ill. App. 181; Prudential Ins. Co. v. Richman, 292 Ill. App. 261; and Penman v. Village of Philo, 309 Ill. App. 49.

As a fourth point plaintiff states that the defendants admit they are violating the spirit and intent of the Illinois statute covering health. We deem this point to be a challenge as to the constitutionality of certain ordinances. As stated, we do not have the power to pass on the constitutionality of the ordinances.

Finally, plaintiff insists that the court was prejudiced in favor of the defendants or that the defendants perpetrated a fraud on the court. There is nothing in the record to indicate that the court was prejudiced in favor of defendants or that they perpetrated a fraud on the court. We must decide this case on the premise that the plumbing code of the City of Chicago and the rules and regulations pertaining thereto are constitutional. The only question presented is whether, presuming the plumbing code to be constitutional, the trial court properly sustained defendants' motion. The



department refused to deal with Mr. Biggs because he was not a licensed plumber. The city authorities dealt with James F. Walsh. He installed a defective plumbing job at 2330 West 111th Street. Walsh did not comply with the plan submitted to the City by him. The Public Works Department notified him to correct the installation and explained the method to pursue in doing so. Walsh refused to comply with the suggestions. Mr. Biggs attempted to deal directly with the Department of Public Works. The employees of this department refused to deal with him because he was not a licensed plumber. We also agree with defendants that Mr. Biggs is not a proper party plaintiff. We are satisfied that plaintiff's first amended complaint does not aver ultimate facts entitling him to the relief prayed. Therefore, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR

44804

JOE R. WILLENS,

Plaintiff - Appellee,

v,

JOE RIO,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

339 I.A. 145²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order dismissing his appeal to the Circuit Court and from orders denying his petitions to vacate the order of dismissal.

Plaintiff's suit before a Justice of the Peace resulted in an ex parte judgment against defendant on May 12, 1948. The transcript of the proceedings was filed with the Clerk of the Circuit Court August 18. The same day defendant's appeal bond was filed with the Clerk. The bond did not bear the written approval of the Justice of the Peace when filed and the Clerk thereupon approved it in writing. Plaintiff appeared specially and made a motion to dismiss the appeal. On October 29, 1948, hearing on the motion, by agreement of the attorneys, was continued until November 5. On that day the motion was sustained and the appeal dismissed for want of jurisdiction. December 1, defendant filed a petition praying that the dismissal order be vacated. December 8, after a hearing, the prayer was denied. December 21, an amended petition was filed; on January 11, 1949, it was further amended and the prayer denied. Defendant claims he is "entitled to have the order of dismissal vacated".

Neither the original petition of December 1, nor the amended petition of December 21, make a showing of diligence. It appears from the statements and inferences therefrom, in the petition, as amended, the attorneys agreed to continue the hearing on plaintiff's motion to dismiss from October 29 to November 5; that the Minute Clerk on November 5, told defendant's attorney that the hearing would probably not be had due to the crowded condition of the call and made a notation of continuance to November 15; that plaintiff's attorney was not in the courtroom at the time and the Judge had not yet appeared; that defendant's attorney, relying upon the advice, left the courtroom to attend to other business; that he did not return to the courtroom to check upon the entry by the Judge of the order of continuance which he was advised would probably be entered; and that the motion was not called November 15, and again on the Clerk's advice defendant's attorney waited until November 22, to learn of the entry of the order on November 5. Under similar circumstances denial of motion to vacate was held not an abuse of the court's discretion. Barrett v. Queen City Cycle Co., 179 Ill. 68; Harris v. Juenger, 289 Ill. App. 467. We hold there was no abuse of discretion in denying the motion to vacate.

The order of November 5, dismissing the appeal was proper on the record before the Judge. The transcript

disclosed a judgment entered against defendant May 12, and the filing of an appeal bond with, and approval by, the Clerk of the Circuit Court more than twenty days after the judgment was entered. This was fatal to defendant's attempted appeal. Clikeman v. Korf, 311 Ill. App. 175.

It is unnecessary for us to consider other points raised by defendant. The orders of November 5, and December 8, 1948 , and of January 11, 1949, are affirmed.

ORDERS AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

44751

CITY OF CHICAGO,

Appellee,

v.

F. H. HOLMES,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

339 L.A. 1461

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant was the manager of an apartment hotel in the City of Chicago. In the absence of the complaining witness, who was a guest at the hotel, defendant plugged the lock so that complaining witness could not re-enter his apartment. From an arrest and conviction of disorderly conduct and fine of \$200, defendant appeals.

It is plaintiff's theory of this case that the action of the defendant in locking out the complaining witness was unlawful and constituted a forcible entry and detainer in violation of the statute, and that the forcible entry and detainer was a breach of the peace or a diversion tending to a breach of the peace and therefore constituted the offense of disorderly conduct.

It is defendant's theory that there cannot be any disorderly conduct under such facts where there was no noise, riot, or disturbance of any kind whatsoever.

Section 193^{b.1}-1 of the Municipal Code of Chicago sets forth acts constituting the offense of disorderly conduct, including therein breach of the peace and diversion tending

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to a breach of the peace. It is to be observed that the ordinance does not make disorderly conduct, as such, an offense; it merely recites that certain acts, including the two above cited, shall constitute the offense of disorderly conduct. Plaintiff argues (a) that the act of defendant in denying complaining witness access to the premises amounted to a forcible entry and detainer (Wright v. Mahoney, 61 Ill. App. 125; Croff v. Ballinger, 18 Ill. 200); (b) that any entry against the will of the lessee must be considered an entry by force (Phelps v. Randolph, 147 Ill. 335); and (c) that the necessary consequence of the unlawful forcible entry and detainer was a breach of the peace or a diversion tending to a breach of the peace and therefore constituted the offense of disorderly conduct.

Assuming that the act of defendant constituted a forcible entry and detainer, we do not agree that a breach of the peace or a diversion tending to a breach of the peace is a necessary consequence. In support of its position plaintiff cites the case of City of Chicago, et al. v. Wright, 69 Ill. 318. This case involved a dispute between the City of Chicago and ^a property owner as to rights in property which the city maintained was a public street and which the adjacent property owner insisted had never been so dedicated. The language cited in plaintiff's brief, to this effect:

✓ The injunction against the chief of police might be regarded as operative, even if the entry should be made with violence and unusual weapons, constituting an offense against the public peace, and, if so, it is an attempt to override the policy of the State in the repression of all forcible entries, because they naturally tend to a disturbance of the public peace. ✓

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should be considered in conjunction with the further statement in the opinion (p. 324):

✓ "But, without any reference to whether he is lawfully entitled to the possession or not, the statute of forcible entry and detainer prohibits the doing the act contemplated, because every entry upon land against the will of the occupant, by the settled law of this State, amounts to a forcible entry, and if done by menaces, force and arms, by the common law, amounts to an offense against the public peace."

It seems apparent to us from a reading of the two passages above quoted that the Supreme Court did not intend to hold that every forcible entry and detainer amounted to an offense against the public peace, but only where the forcible entry and detainer is accompanied by some act indicative of force or violence. An examination of the record in the instant case fails to indicate any such force or violence. There was no evidence as to any noise, riot, or disturbance, nor was the act public in character, nor did it affect the public peace. There is no showing that the citizens of the community or any guests of the hotel were disturbed or affected by the acts of the defendant. If a breach of the peace had ensued, it would have been as a result of a disorder which would have been created by the complaining witness. We think there was no such provocation offered as to reasonably incite the complaining witness to any violation of law.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED. ☐

(9) Niemeyer and Feinberg, JJ., concur.

44799

FRANCESCA NAPOLITANO,
Appellee,
v.
BERTHA MARQUIS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

339 I.A. 146²

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her action in forcible entry and detainer in the Municipal Court of Chicago, alleging that she was entitled to possession of the second floor flat at 3621 West Fifth Avenue, Chicago, and that possession was wrongfully detained. Trial by the court resulted in a judgment for possession. Defendant appeals.

Defendant maintains (1) that the sixty-day notice of termination of tenancy required by the Federal Housing and Rent Act must be served personally and not by mail, and (2) that the finding to the effect that the plaintiff required the premises for the immediate use of a member of the family is not sustained by the evidence.

While it is true that the sixty-day notice of termination of tenancy is required, there seems to be no controversy in this case that such a notice was served and that it was received by defendant. The notice having been received within the statutory period, it becomes immaterial whether it was served personally or by registered mail. Goroway v. Shelby, 331 Ill. App. 181; Ziff v. Sandra Frocks, Inc., 331 Ill. App. 353.

2.

Upon the question of whether or not the plaintiff wanted the premises for the immediate use of a member of her family the evidence seems undisputed that plaintiff wanted this apartment for her unmarried son who was engaged to be married within a few months of the time the action was initiated. Defendant argues that the need was not "immediate" within the language of the Housing and Rent Act. The sixty-day notice was given October 28, 1948, and the trial was had on January 25, 1949, after which the writ of restitution was stayed for 90 days. The marriage was to take place on April 27, 1949, two days after expiration of the stay order. We are aware of no rule which requires the person desiring the premises to wait until the need has become acute. Reasonable precaution dictated that the proceeding be commenced in ample time to provide for the delays that might be expected in obtaining possession. We are of the opinion that under all the facts and circumstances it was a matter for the court to determine whether or not the landlord in good faith sought the recovery of the premises for the immediate and personal use and occupancy as housing accommodations by a member of her immediate family. The court found such to be the case, and we are not inclined to interfere with the judgment. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Niemeyer and Feinberg, JJ., concur.

44653

WILLIAM E. EMMICK,
Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, a corporation, and
GIRTON BROTHERS, INC.,
Defendants.

On Appeal of THE BALTIMORE & OHIO
RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

339 I.A. 147

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action for personal injuries against defendant Baltimore & Ohio Railroad Company, under the Federal Employers' Liability Act, and against Girton Brothers, Inc. for common law negligence. A trial with a jury resulted in a verdict for plaintiff, against both defendants, from which only the Baltimore & Ohio Railroad Company appeals. No question is raised by this defendant as to the applicability of the Federal Employers' Liability Act.

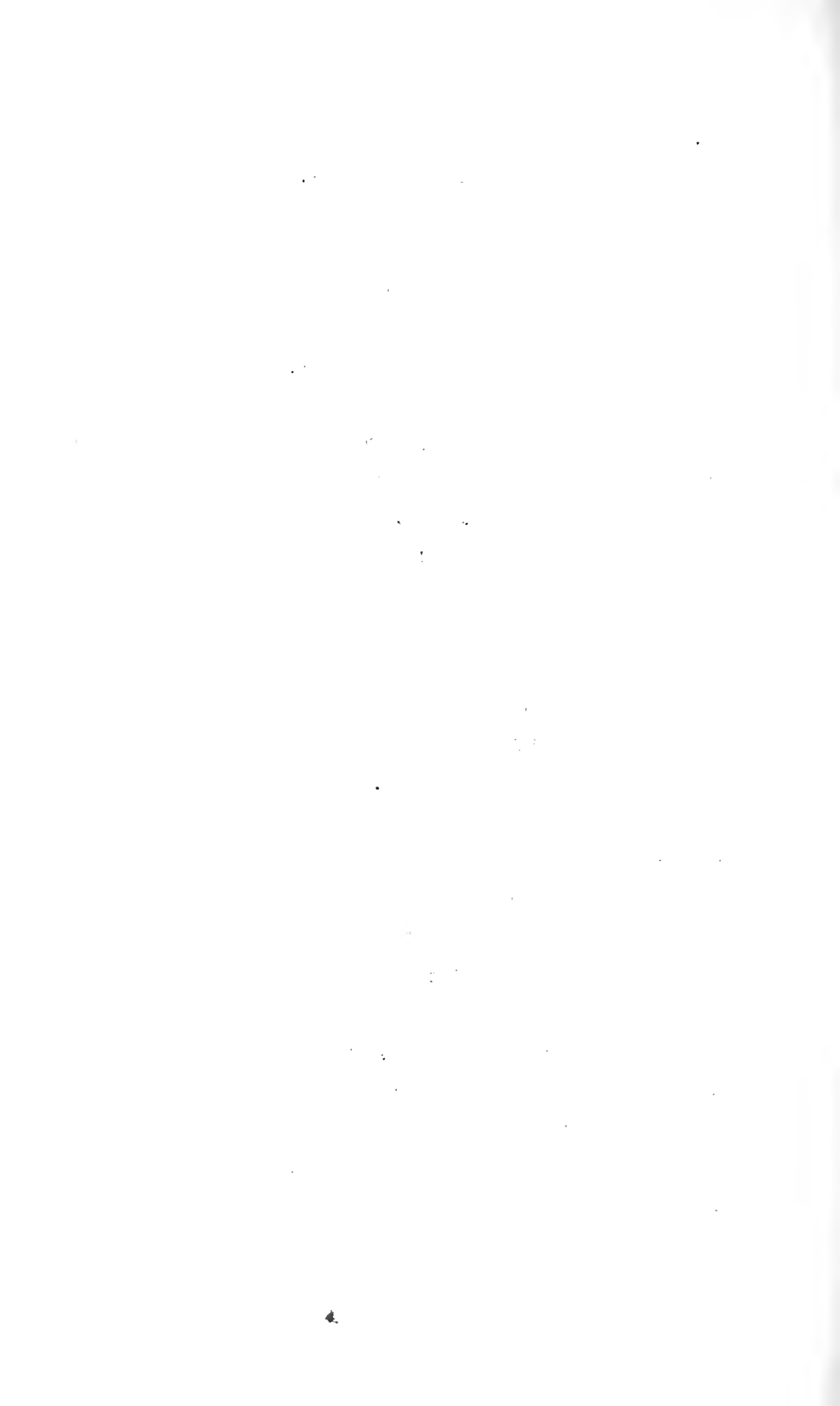
Plaintiff was the fireman on the lead engine of a two engine train, running east from St. Louis to Washington, Indiana. The accident occurred in Lawrenceville, Illinois, on the 12th Street crossing, resulting from a collision between this train and a gasoline truck owned and operated by defendant Girton. The engineer on the lead engine was killed as was the truck driver. Plaintiff sustained serious

2.

injuries as a result of the accident.

X The train in question was traveling east on the main track at a speed variously estimated between 77 and 80 miles an hour. Some 78 feet south from the main track, at the crossing in question, was another crossing known as Illinois Street, which intersected 12th Street. About 620 feet east of 12th Street, on Illinois Street, was an oil ^{supply} depot, from which the truck, loaded with 3800 gallons of gasoline, came. It traveled this distance on Illinois Street west to the intersection of 12th Street. There was at the northeast corner of 12th and Illinois Streets facing east, an amber and no right turn flasher light, which was synchronized with the flasher lights at the 12th Street crossing and the railroad track, so that when the flasher lights at the railroad intersection were in operation, the flasher light at 12th and Illinois Streets would operate, if both were in good mechanical working order.

The driver of the truck in question, when reaching the intersection of Illinois and 12th Streets, turned the cab of his truck in a northerly direction on 12th Street and stopped to talk to a dispatcher of defendant Ginton. The flasher lights at 12th and Illinois Streets were flashing, as were the flasher lights at the railroad intersection with 12th Street. It is undisputed that the two sets of lights referred to operated on the same electrical circuit and started operating when a train would reach a contact point located 3,419 feet west of the 12th Street crossing and the railroad track in question.



3.

The undisputed evidence is that when the truck turned north into 12th Street and proceeded slowly north, these flasher lights referred to were working. There was a grade from the level of 12th Street to the railroad crossing of about 7 per cent. In addition to the flasher lights, there was a little to the south of the intersection of 12th Street and the railroad track, on a high standard, a sign reading "Stop on red light."

It is definitely established by the evidence that the train in question started sounding its warning whistle 800 feet west of the 15th Street crossing, which would be west of the 12th Street crossing, and that the whistle was blown continuously to the time of the collision. That the engineer on the lead engine applied his brakes before reaching the crossing in question is confirmed by plaintiff and the rest of the crew, who testified they felt the brakes go on at or near the crossing.

It further appeared from the evidence that there was a switch track 9 feet 7 inches south of and parallel with the main track, which had a ramp leading to a loading platform located 26 feet west from the west curb of 12th Street, and that on the day in question a freight car was at the loading platform being loaded.

The engineer on the second engine saw the truck approaching, and jumped behind the boiler head for safety.

An amendment to the complaint was filed upon the trial, alleging the existence of a rule of the railroad company referred to as 103-A and negligence on the part

4.

of defendant railroad in the violation thereof. The rule was received in evidence and reads:

"When a car or cars are set off or placed on any track they must be left standing not less than one hundredfifty feet from the center line of the highway crossing when space permits."

Defendant here contends that there is no evidence in the record establishing negligence on its part in the operation of its train or under any of the circumstances surrounding the accident. It is conceded by plaintiff that the Employers' Liability Act requires that negligence be alleged and proved and that such negligence in whole or in part proximately caused the injuries. It becomes necessary for us to determine whether there is any evidence in the record tending in any degree to prove negligence on the part of this defendant. The rule so often stated is that if there is any such evidence, we would have no right to interfere with the trial court's ruling refusing the motion to direct a verdict or denying the motion for judgment non obstante verdicto. Merle v. Public Service Co., 381 Ill. 300; Shannon v. Nightingale, 321 Ill. 168; Elbers v. Standard Oil Co., 331 Ill. App. 207; Tobin v. Consolidated Freight Co., 334 Ill. App. 394.

We have carefully examined the evidence and every reasonable inference which the evidence discloses favorable to the plaintiff, and we are compelled to conclude that there is no evidence whatever of any negligence on the part of the defendant. What more this defendant could have done in the practical operation of its train

5.

in question has not been satisfactorily pointed out to us. Ample warning lights at the crossing and at 12th and Illinois Streets were in operation long enough before the accident to have given the truck driver due warning of the approach of the train. The blowing of the whistle continuously from 800 feet west of the 15th Street crossing could and should have been heard by the driver of the truck as he was driving 620 feet from the oil depot gate west on Illinois Street to the 12th Street intersection, and as he was slowly driving his truck toward the railroad crossing in question at 12th Street. On this appeal no one disputes the negligence of the truck driver - in fact, negligence which, under all the circumstances, was clearly, in our opinion, wilful and wanton. This, however, does not relieve this defendant of liability under the Employers' Liability Act, if we could find any evidence, as suggested, of negligence in whole or in part causing this accident.

The rule of the railroad company, 103-A, so strongly relied upon by plaintiff as the basis for negligence on the part of the railroad company in allowing the freight car being loaded to stand less than 150 feet from the center line of the highway crossing, it will be noticed reads "when space permits." It was not an absolute prohibition under any and all circumstances. It only applied when space permitted. The loading platform was at the point indicated, where the car could only be when loaded or unloaded.

The engineer on the second engine of the train in question saw the approach of this truck. The engineer on

6.

the first engine, who was killed in the accident, stationed on the same side of his engine as the engineer of the second engine, must have seen the approach of this truck. That their view of the crossing in question was not obstructed by the standing freight car is firmly established by the evidence. It is conceded by plaintiff that a train traveling at the rate of speed of the one in question could not have stopped in time to have avoided the accident. Such speed as shown here is not negligence. Carrell v. N.Y. Central R.R. Co., 384 Ill. 599, 606. The driver of the truck had every opportunity for observing and hearing the approach of the train, and the standing freight car being loaded was not an obstruction to his view. The freight car not being an obstruction to his view, or to the view of the engineers on the first and second engines, there is therefore no basis for the contention that the standing freight car constituted any negligence on the part of the defendant.

Our plain duty in this matter is to declare that there is no evidence of negligence on the part of the defendant, and that the trial court should have entered a judgment non obstante veredicto.

The judgment of the Superior Court is reversed.

REVERSED.

Tuohy, P. J., and Niemeyer, J., concurs.

44757

HELEN HERZOG,
Appellee,
v.
NEISNER BROTHERS, INC.,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

A
57
339 I.A. 1481

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$15,000 entered on a verdict in a personal injury action.

Defendant operated a five-cent to one dollar store on Lake street in Oak Park. There were eight entrance doors, all facing Lake street. Plaintiff was employed in a retail jewelry store on Lake street near defendant's store. On January 21, 1946, plaintiff, intending to make a purchase, was entering defendant's store at the most westerly door. There was ice in front of the door. She knew that the doors worked hard. She took a firm hold of the door and pushed it back about a third when it snapped back, knocked her off sideways and she fell on the ice on her knee. She was in the hospital about two weeks. Her right kneecap was broken into three segments. By an operation these segments were joined together, resulting in a good alignment but leaving her with a permanent impairment of 10 per cent in the extension of her right knee and of roughly 20 per cent in "its drawing backwards or flexion." She used crutches for about nine weeks and a cane for three more. One witness for plaintiff testified

2.

that she used the most westerly door to defendant's store in December 1945, close to Christmas; that the door went in a little way and pushed right back again and that she reported the condition to the girl at the jewelry counter. Another witness, who frequently ate lunch in defendant's store, says that a day or two before January 21, 1946 the door involved herein was rather hard to push open and that it shoved right back; that she called the attention of the girl behind the lunch counter to the condition. This evidence is sufficient to support a verdict on the first count of the complaint, which charges negligence in allowing and permitting the door to remain in a bad state of repair.

No error was committed in giving the instructions requested by plaintiff. They stated recognized rules of law and are applicable to the facts in evidence. Complaint is made that defendant was prejudiced by the court's examination of a witness called by defendant. We find no basis for this charge. Moreover, no objection was made to the examination on the trial.

Complaint is made that the damages awarded are grossly excessive. The injuries sustained are permanent and the plaintiff is comparatively young. The damages awarded are, as was said on oral argument by appellant, overly generous. This is in harmony with the present trend of liberality on the parts of jurors and courts and may be attributable in part not only to the reduced purchasing power of the dollar, but to a belief that defendants in

3.

personal injury actions are covered by insurance. The latter reason is no justification for a large verdict. The amount of damages is primarily a question for the jury. The trial court has approved the award. Since plaintiff has sustained permanent injury, we cannot say the damages are so grossly excessive as to require action by this court. Ford v. Friel, 330 Ill. App. 136, 140.

The judgment is affirmed.

AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

44772

LILLIAN GOLDBERG,
Appellant,
v.
WM. M. BRZEZICKI,
Appellee.

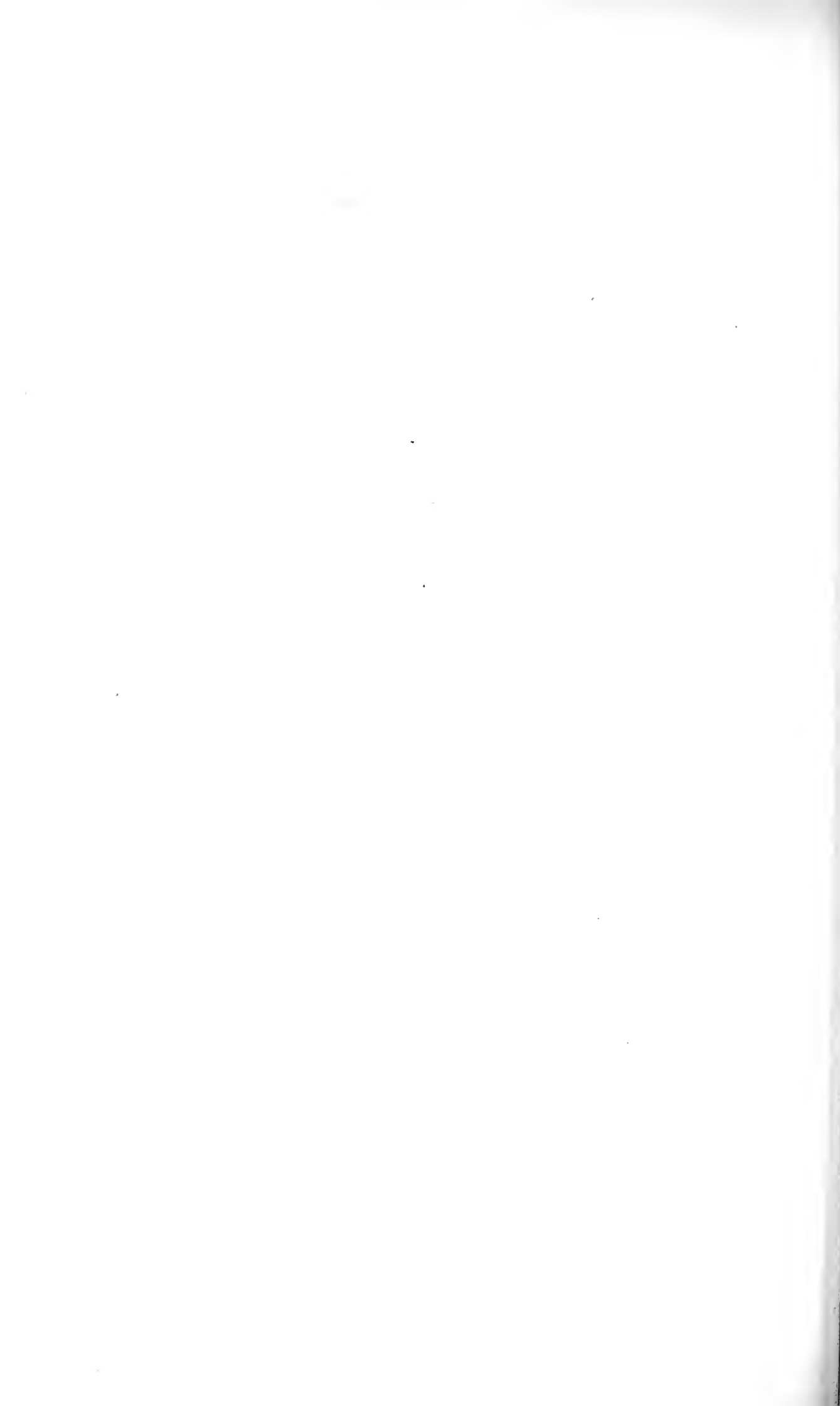
APPEAL FROM MUNICIPAL
COURT OF CHICAGO

339 I.A. 148²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in her suit for rent for the months of April through September, 1947, and \$75 attorneys' fees.

The lease for the premises involved herein covered the period from May 1, 1944 through April 30, 1947, "and from year to year thereafter, unless and until this lease shall be terminated at the date last above mentioned, or at a like date in any subsequent year thereafter, by the giving by either party to the other of not less than 60 days' notice in writing of such termination, which said notice shall be delivered in person or sent by registered mail, when to Lessor, at the place stipulated herein for the payment of rent **." The plaintiff is an assignee of the lease and acquired title from lessor by quitclaim deed dated August 1, 1946. No notice of the transfer of the property or assignment of lease was given to defendant. Defendant offered evidence tending to show that, on February 3, 1947 he notified Simon Levy, original lessor, by an unregistered letter that possession of the premises would be surrendered on April 30, 1947. Defendant further claimed



2.

that a check for the February rent was enclosed with the letter. The check in evidence shows its receipt and deposit by the attorney for plaintiff on February 4, 1947. Simon Levy denies receipt of the letter. Defendant also offered evidence tending to show the sending of a registered letter dated March 26, 1947, together with a key to the premises and a check for the April rent. Simon Levy, to whom this letter was addressed, refused to accept it and defendant took no further steps to deliver the key or the check. On the trial defendant admitted that no rent was paid after the tender of this check for April rent. No further tender of the rent for April was made. At the request of defendant the court instructed the jury as follows:

"(1) If you believe from a preponderance of the evidence that the defendant had notified defendant's landlord, Simon L. Levy, when defendant paid the February rent on February 3rd, 1947, that defendant would surrender possession of the premises in question on April 30th, 1947, and that the rent so paid was accepted by said landlord with said notice, and that said landlord said nothing, the plaintiff as said landlord's assignee was charged with acquiescence of the provisions of said notice; then in that event your verdict should be for the defendant."

This instruction, which directed a verdict, is plainly erroneous. Among other matters upon which defendant's right to a verdict depended was the payment of the April rent, which was admittedly due and which is ignored by the instruction. Testimony as to tax foreclosure proceedings was inadmissible.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Tuohy, P. J., and Feinberg, J., concur.

44784

MITCHELL DOUGLAS,
Appellee,

v.

PERCY THOMPSON,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO

339 I.A. 149¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment in a forcible detainer action brought for the possession of the house in which defendant was living.

Plaintiff and his wife, Anna V. Douglas, entered into a contract to purchase the premises involved herein for the sum of \$5,500, of which \$2,000 was paid concurrently with the execution of the agreement and the balance with interest was to be paid in monthly instalments not exceeding \$50 per month. Deed was not to be delivered until the payment of \$3,000 on the principal, and it was expressly provided "That no right, title or interest, legal or equitable, in the premises aforesaid, or any part thereof, shall vest in the Purchaser until the delivery of the deed aforesaid by the Seller, or until the full payment of the purchase price at the times and in the manner herein provided." It is not contended that a deed was issued, or that plaintiff and his wife were entitled to a deed. The purchasers under the agreement, therefore, were not entitled to possession. Coleman v. Connolly, 139 Ill. App. 383. They had neither the legal nor equitable title to the property covered by the contract. Capps v. National Union Fire Ins. Co., 318 Ill. 350.

The judgment is reversed.

REVERSED.

Tuohy, P. J., and Feinberg, J., concur.

44752

BEN D. LEVINE,)
Appellant,)
v.)
SAM LEVIN and)
WILLIAM S. KAPLAN,)
Appellees.)

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

339 I.A. 149²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

The plaintiff, Ben D. Levine, beneficiary of a land trust on property improved with an apartment building in Chicago, brought forcible detainer proceedings under the provisions of the Housing and Rent Act of 1947, as amended (50 App., U.S.C.A., sec. 1899), against Sam Levin and William S. Kaplan for possession of their apartment which they had occupied since 1941, for use and occupancy by a member of his immediate family. Trial by the court without a jury resulted in a finding and judgment for defendants, from which plaintiff appealed. The trial court was evidently of the opinion that the beneficiary of a land trust is not a "landlord" within the provisions of the Housing and Rent Act, and that plaintiff as such beneficiary was not entitled to maintain an action in forcible detainer in his own name.

After this proceeding had been tried and determined in the Municipal Court and the instant appeal perfected, the plaintiff, evidently entertaining some doubt as to his right to maintain the action, obtained a reconveyance of the property to himself by the trustee, and thereafter started a second forcible detainer proceeding which, on September 26, 1949, resulted in judgment for

possession in his favor against the same defendants. In that proceeding the court allowed defendants 120 days in which to move, but later, on October 13, 1949, on plaintiff's motion, expunged the words "one hundred twenty days in which to move" and inserted in lieu thereof the following: "defendant has ninety days in which to move," and entered the order nunc pro tunc as of September 26, 1946, the day on which the original judgment for possession was entered. Defendants appeal from that order on the theory that the court had no jurisdiction to enter such an order. Thus there were two appeals pending simultaneously, the other being No. 45019. On November 1, 1949, plaintiff's counsel filed a motion to dismiss the appeal taken in cause No. 45019, which was allowed by the first division of this court on November 10, 1949. The effect of the dismissal of the second appeal was to allow the judgment for possession in favor of plaintiff in the second forcible detainer proceeding to stand. Under that judgment plaintiff will shortly obtain possession of the premises.

It therefore appears that in the instant appeal the question of the right of plaintiff to possession is purely moot; even a reversal would not give plaintiff any greater right than he already has, namely, judgment for possession. Accordingly the motion of appellees to dismiss this appeal, which was reserved to hearing, is allowed, and the appeal is dismissed.

Appeal dismissed.

Scanlan and Sullivan, JJ., concur.

44876

HYMAN BOGOLUB,
Appellee,
v.
JULIUS LENCIONI et al.,
Appellants.

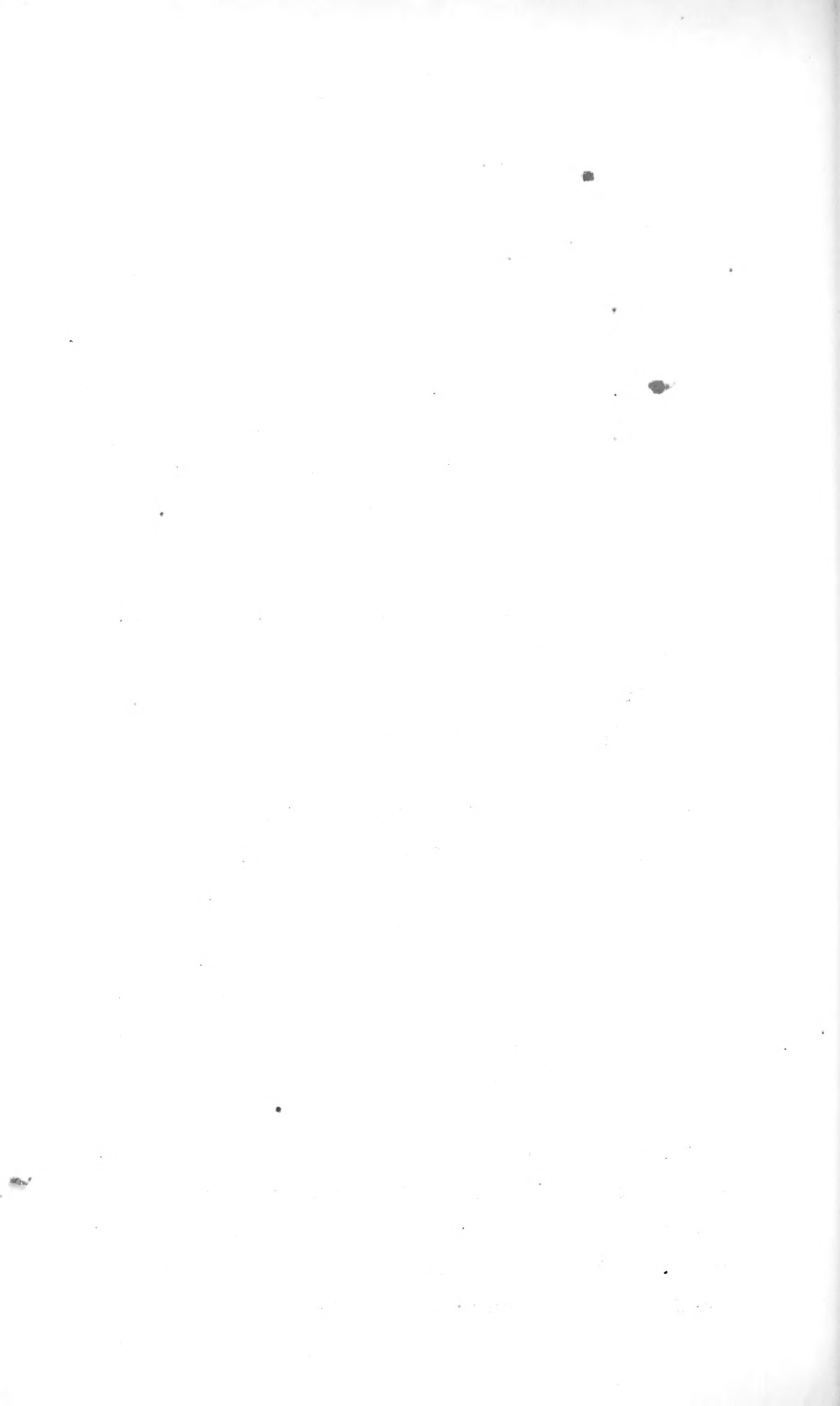
)
) INTERLOCUTORY
)
) APPEAL FROM SUPERIOR COURT
)
) ORDER GRANTING INJUNCTION.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

339 I.A. 150

The defendants, Julius Lencioni and his wife Kalla, appeal from an order for a temporary injunction entered in the Superior Court restraining them from prosecuting a forcible entry and detainer suit in the Municipal Court for possession of premises occupied by plaintiff Hyman Bogolub.

It appears from the amended complaint that on February 2, 1944 Lencioni as lessor and Bogolub as lessee entered into a written lease for premises "known and described as follows, to-wit; 2510 East 79th Street" in Chicago, Illinois, expiring March 31, 1949, to be used by lessee for the sale at retail of dry goods, clothing, shoes and other wearing apparel. A rider attached to the lease gave the lessee an option to renew the lease for a period of five years upon giving the lessor notice in writing of his intention so to do by registered mail within a prescribed period of time. Within the period stipulated for exercising the option the lessee mailed to lessor notice in writing that he had elected to exercise the option for an additional five years upon the same terms and conditions and at a rental of \$150.00 per month, which was the maximum rental provided for in the original lease. Upon notice of this receipt the lessor



sent lessee a rejection of his offer to exercise the option. The reasons assigned for rejecting the option were that the demised premises were erroneously described as 2510 East 79th street instead of as 2520 East 79th street, the correct address, and that the lessor's name was improperly spelled. Forcible detainer proceedings were instituted in the Municipal Court by Lencioni, but about the same time and before that case could be heard and determined Bogolub filed his complaint in the Superior Court for reformation of the written lease and for an injunction to restrain the prosecution of the Municipal Court suit.

It is apparent from the allegations of the amended complaint that the address of the premises appearing in the lease was a mutual mistake of fact. Lencioni never owned premises known as 2510 East 79th street, nor was it ever contemplated that the leased premises were to be any other than 2520 East 79th street, of which Lencioni and his wife were the owners. The principal ground urged for reversal is that the amended complaint "fails to state a cause of action invoking the basic equity rights arising from mistake or the equitable remedy of reformation; that the complaint fails to exculpate plaintiff from negligence and laches; that there is no proper showing of facts or prayer for injunctive remedy; * * * [and that] plaintiff has an adequate remedy at law, and there is no showing of irreparable injury if the chancery Court fails to act."



It is fundamental that courts of equity will reform written instruments where there is a mutual mistake of fact. Kelly v. Galbraith, 186 Ill. 593; Schaefer v. Henze, 337 Ill. 41; Mansell v. Lord Lumber and Fuel Co., 348 Ill. 140; Biskupski v. Jaroszewski, 398 Ill. 287; Utterback v. Estill, 224 Ill. App. 151; Smith v. Material Service Corp., 312 Ill. App. 433; Fredman v. Sutliff & Case Co., Inc., 330 Ill. App. 119. The only fair conclusion to be drawn from the allegations of the amended complaint is that the parties made such a mistake; the lessor drew the lease and inserted the wrong address; but it is clear that he intended to demise, and the lessee to rent, the specific premises which the lessee had occupied for five years and which are correctly known as 2520 East 79th street. However, the mistake was not discovered by Bogolub until Lencioni had rejected his election to exercise the option. It may fairly be assumed from the allegations of the complaint that Lencioni himself did not know of the mistake until many years after the lease was executed. Under the circumstances the charge of negligence and laches on the part of plaintiff is untenable. Moreover, it would be inequitable to permit the lessor to urge his own mistake as ground for reversal; he drew the lease and inserted the wrong address.

The contention that there is no allegation of irreparable injury is likewise untenable. It appears from the complaint that plaintiff had a right to exercise his option for renewal of the lease. To permit Lencioni to dispossess

Bogolub would defeat his right to continued possession. The Municipal Court has no equitable power to reform an instrument; such a proceeding has to be brought in a court having equitable jurisdiction, and the Superior Court being so vested, properly issued the restraining order to preserve the status quo until the cause can be disposed of on the merits. Almon v. American Carloading Corp., 380 Ill. 524; Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570. The rule is also well established that when a court of equity has jurisdiction of a cause for one purpose it will retain such jurisdiction for all, determining the rights of the parties. Morris v. Patterson, 311 Ill. App. 657.

Kalla Lencioni interposed a special defense and filed separate briefs on appeal. She takes the position that she never signed the lease or knew any of the terms or conditions thereof. However, the amended complaint specifically alleges that the lease was drawn and executed by Julius Lencioni with the knowledge and consent of his wife, and was delivered to the lessee with her authority; that since January 1, 1945 and up to the present date rent has been paid to her monthly; that she accepted the monthly rentals, knew that they were being paid under the terms of the lease, and thereby ratified the leasing of the premises. Proof of these averments would amount to a ratification of the lease, and she would be bound by its terms as if she had signed it. Eagle Brewing Co. v. Netzel, 159 Ill. App. 375; Schwartz



v. McQuaid, 214 Ill. App. 357.

The injunction from which the appeal is taken was entered after due notice, and plaintiff filed a bond as directed by the court, which was approved. We find no convincing reason for reversal, and therefore the order of the Superior Court is affirmed.

Order affirmed.

Scanlan and Sullivan, JJ., concur.



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THIRD DISTRICT

Agenda No.11

352-17

It appears from the evidence that plaintiff had been employed by defendant, or its predecessor for a period beginning in October, 1946, as production manager of defendant's dress factory. It was his duty to see that the sample dress lines were made up, to make time studies upon production of new lines to determine the costs, and in general to exercise supervision over the entire factory and the employees. His written contract expired October 15, 1947. The issue

is presented clearly in defendant's statement of the case: "There is no question but that the plaintiff was employed by the defendant at a salary of \$1,000.00 per month at the time of his discharge. The question is whether the parties entered into an oral contract establishing a definite period of employment."

Plaintiff testified that he had a conversation with A. F. Keating, President of defendant's company, about March 15, 1948, in which witness said he was going to leave defendant's employment but that he would stay until the new line of dresses was out and defendant had an opportunity of hiring someone to replace him; that Keating stated that was satisfactory and that if he would stay until July 15 they would have plenty of time to get the line out and for plaintiff to break someone else in on the job; and that his salary would continue at the rate of \$1,000.00 per month. He further stated that he was discharged without fault on his part May 15, 1948, and thereafter unsuccessfully sought employment during the next two months. The witness Keating in referring to this conversation testified that plaintiff said, "Well, you won't be able to depend upon me any longer than July 15, and I will stay until then and help you if I can *** that is, if I don't get something else in the meantime." The witness denied that plaintiff was to be employed until July 15 and denied that he was to be paid at the rate of \$1,000.00 per month. No other witness testified as to that conversation. An employee of the company, Paul Frushour, testified that he had a conversation with plaintiff about March 15 in which plaintiff stated he had talked with Mr. Keating that morning and stated that he, Paley, was going to leave on July 15 unless he found something sooner. Plaintiff denies making the statement "unless he found something sooner".

As to whether or not plaintiff had a definite contract for a period of four months, the evidence is conflicting. Citation of authorities is unnecessary in stating that the trial court, hav-

ing had an opportunity to see and hear the witnesses is in a better position than a reviewing court to pass upon their credibility and the weight to be given their testimony. A finding of the trial court is entitled to the same weight as that of the verdict of a jury and will not be disturbed unless against the manifest weight of the evidence. It cannot be said that such was the case here.

It is next urged that even though it might be held that plaintiff had a contract of employment for four months, yet the defendant had the right to discharge him May 15 for failure of plaintiff to perform his duties. The record discloses considerable bickering between plaintiff and the company, but again the matter of justification for the discharge of plaintiff is for the trial judge to pass upon.

The defendant company assigns as error the admission into evidence of certain exhibits, one being the original written contract of September 17, 1946, between plaintiff and defendant which by its terms expired October 15, 1947, and two, being letters relating to plaintiff's compensation under that contract. Complaint is also made as to the admission in evidence of certain conversations between plaintiff and an officer of defendant company prior to March 15, 1948, concerning a renewal of this contract. The admission of these exhibits and this testimony was proper under the rule that attendant conditions surrounding an oral contract of hiring, the course of dealing and conduct of the parties, and other acts, may be shown for consideration/ⁱⁿdetermining the provisions of the oral contract in question. In any event the conclusion reached by the trial court was adequately supported without recourse to the evidence to which objection was made. It will be presumed that the trial court formed his conclusion on competent evidence only.

In consideration of the above, the judgment of the trial court is affirmed.

Affirmed.

44455

DAVID BASS and YETTA BASS,
Appellants,

v.

CHICAGO, DULUTH & GEORGIAN
BAY TRANSIT COMPANY, a
corporation,

Appellee.

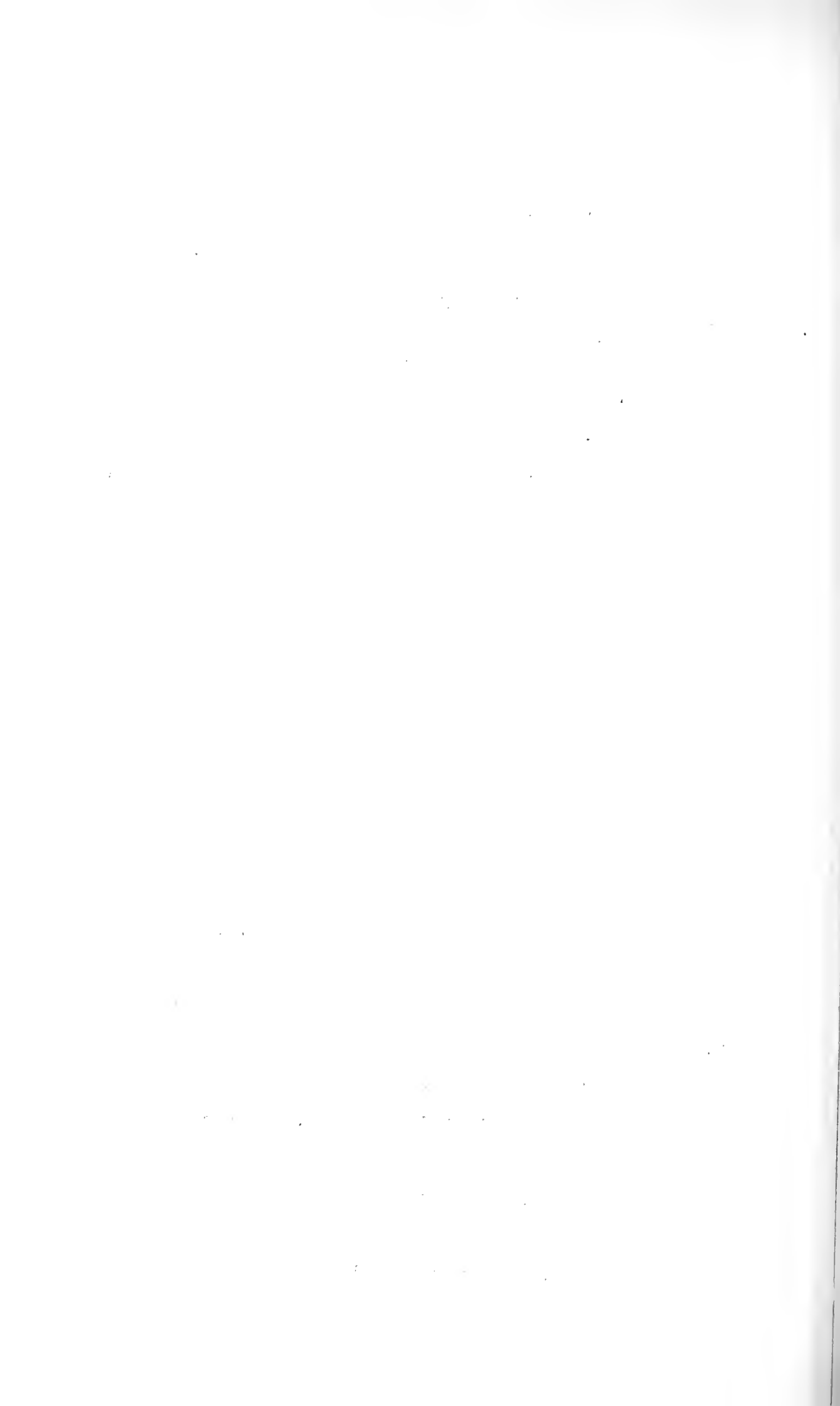
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

339 I.A. 246

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

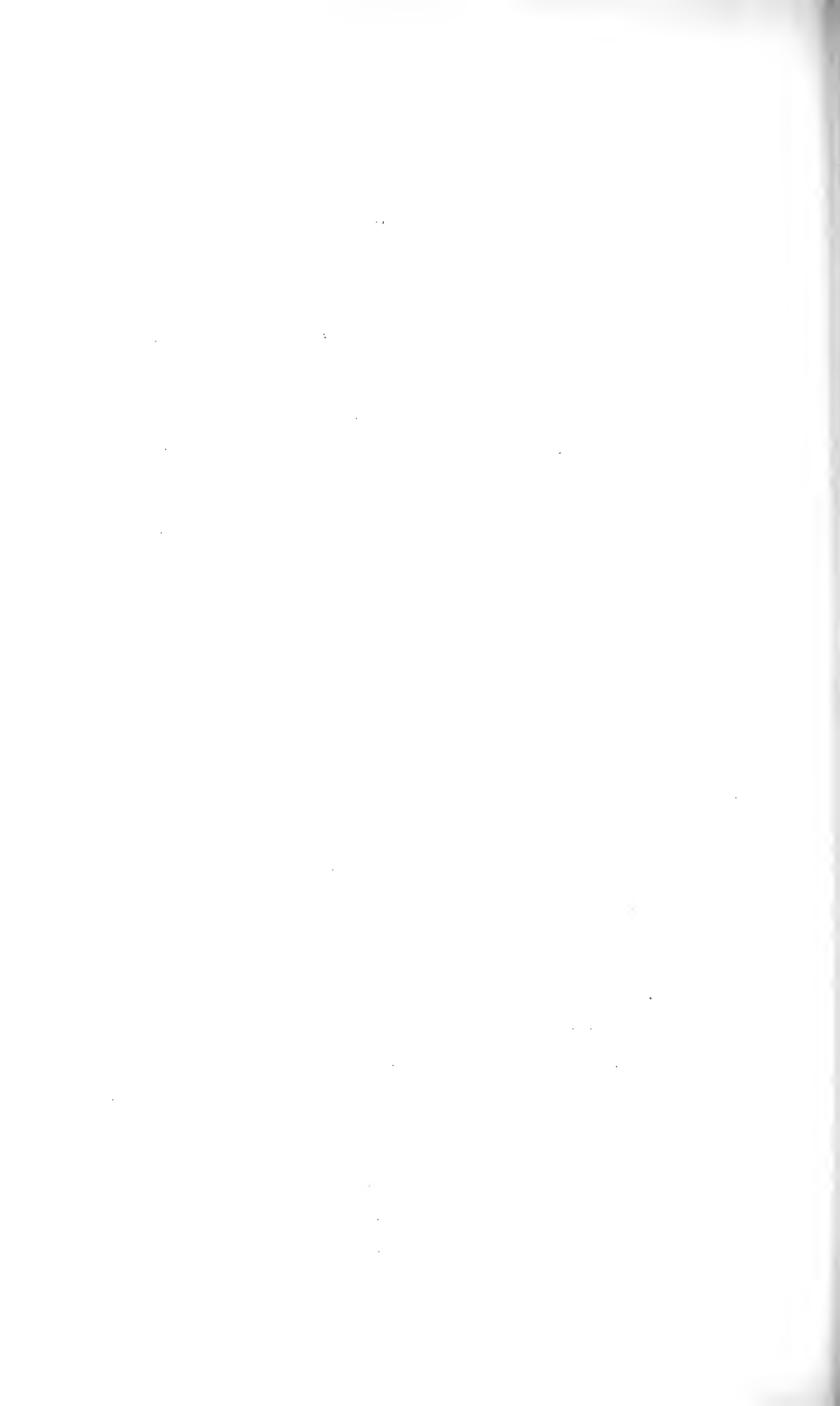
Plaintiffs, David Bass and Yetta Bass, his wife, brought suit to recover \$890.95, the value of a wardrobe trunk and its contents, which were lost by the defendant steamship company. The case was tried by the court without a jury, resulting in findings for plaintiffs, but only to the extent of \$239.50, for which judgment was rendered. Plaintiffs appeal.

It appears from the evidence, as to which there is substantially no dispute, that plaintiffs, who reside in Louisville, Kentucky, with their two children, were passengers on the steamship S.S. North American, taking a vacation cruise on the Great Lakes. The ship left Chicago on August 26, 1944 at about 7:00 p.m. Holding first class tickets for staterooms 235 and 237, plaintiffs arrived at defendant's dock in a taxicab about 3:30 p.m. They had with them five pieces of luggage, including the wardrobe trunk which was subsequently lost, and were directed by defendant's employees to check their luggage at the baggage room on the dock and to board the ship that evening. Accordingly David Bass turned over the five pieces of luggage to one of defendant's employees, paid twenty-five cents to check each piece and was



given five baggage checks or stubs with which to reclaim his luggage. There was no legend or other notice on plaintiff's steamship tickets advising him that defendant's liability for luggage was limited in any manner or amount, nor were there any signs or notices in the baggage room indicating limited liability. The identification checks for the checked luggage were perforated in the middle; one-half of the check was torn off at the line of perforation and handed to David Bass as his baggage check or identification stub. Of the five stubs which he received, only one bore the rubber stamped legend reading "Limit liability of \$100.00 for passe[n]ger". When plaintiffs and their children boarded the ship that evening, four pieces of luggage were brought to their stateroom, but the fifth was missing and was never recovered. That piece contained a large quantity of Mrs. Bass' jewelry, and some of the clothing and personal effects of all the members of the family. The value of the trunk and its contents was shown, by substantially undisputed evidence, to be \$890.95.

By way of defense defendant introduced a tariff schedule filed with the Interstate Commerce Commission limiting the liability for passenger luggage to \$100.00 for each adult passenger and \$50.00 for each child, unless a greater value was declared and additional charges paid for such additional value. The schedule did not contain any formula or table as the basis for



computing the additional charges to be paid for excess value in the event that a passenger declared his valuation at more than \$100.00 or \$50.00 for any one piece of luggage. The court found that defendant's tariff schedule was valid and binding upon plaintiffs, and limited their recovery to \$100.00 for each of the plaintiffs and \$39.50 for the personal effects of the two children, or a total of \$239.50, for which judgment was entered.

Rule 8, which contains the applicable part of an eight-page printed tariff schedule filed by defendant, reads as follows: "Baggage consisting of wearing apparel, toilet articles and similar effects in actual use and necessary and appropriate for the wear, use, comfort and convenience of the passenger, not exceeding 150 pounds, will be transported free on each full-fare ticket. All other articles, such as household goods, and camping effects, baby carriages, go-carts, motorcycles and bicycles, will be accepted for transportation on same steamer with passenger upon payment of regular excess baggage rates for gross weight. Baggage may be checked either going or returning to any point at which stop-over is permitted. Unless a greater sum is declared by the passenger and charges paid for excess valuation at time of delivery to this Company, the value of baggage belonging to or checked for an adult passenger shall be deemed and agreed to be not in excess of One Hundred Dollars (\$100.00), and the value of baggage belonging to or checked for a child traveling on a half-fare ticket



shall be deemed and agreed to be not in excess of Fifty Dollars (\$50.00)."

The law is well settled that under the Federal statute (49 U.S.C.A. 6(7)) an interstate carrier may not levy or collect any charges whatsoever for transporting passengers or property without having filed and published rates. Atchison, T. & S. F. R. Co. v. Robinson, 233 U.S. 173; Clingan v. Cleveland, C., C. and St. L. Ry. Co., 184 Ill. App. 202. The rule is also well settled that passengers and shippers are bound by the terms of tariff schedules properly filed, even in the absence of actual knowledge by passengers and shippers of the contents of such schedules. Boston & M. Ry. Co. v. Hooker, 233 U.S. 97, and New York C. & H. R. R. Co. v. Beahan, 242 U.S. 148, are the leading cases on the subject. It appears, however, that in these and other decisions relied on by defendant, some notice was in fact given which would normally come to the attention of a reasonably alert passenger and advise him of the existence of some value limitation. Thus, in the Hooker case notices indicating limited liability "were posted at or near the offices where passenger's tickets were sold in the Boston station," and such "notices were posted in the baggage room of that station, in a conspicuous place, and in sight of persons using the room for checking baggage." The court held that under the circumstances plaintiff was bound by such limitation. In the Beahan case plaintiff's passenger ticket stated

on its face that baggage liability was limited, and the luggage receipt given her bore the words: "See conditions on back. Value not stated." On the back was printed in explicit language: "Notice to passengers. Baggage consists of a passenger's personal wearing apparel and liability is limited to \$100 (except a greater or less amount is provided in tariffs) on full fare ticket, unless a greater value is declared by owner at time of checking and payment is made therefor." In that case it was held that mere failure by the passenger to read matter plainly placed before her could not overcome the presumption of assent. In the case at bar the only means which plaintiffs would have had to ascertain the limit of liability claimed would be by reading rule 8 of defendant's tariff schedule. There were no signs, placards or notices of any kind to call plaintiff's attention to the claimed limitation. To expect even a normally prudent passenger to know that a tariff schedule had been filed with the Interstate Commerce Commission, without notice of some kind, carries the rule of implied notice to unreasonable extremes.

However, there is another important circumstance to be considered in deciding this case. Even if plaintiffs had desired to declare the full value of their baggage, neither they nor defendant's agent could have determined the amount of the extra charge which plaintiffs would have been required to pay. The tariff



schedule filed by defendant lacks any table, formula or other means of computing or determining the additional charge. In Hartzberg v. N.Y.C. R. Co., 41 N.Y.S. 2d 345, cert. den. 328 U.S. 849, the court held that "in order that a carrier may avail itself of the benefit of its assertion of liability to an agreed valuation, it must appear that a choice of rates was present so that the passenger or shipper might have secured full coverage or protection for his property by payment of a higher rate for the carriage." In that case the essential choice of rates was found in the defendant's tariff, but impliedly if it had not been shown in the tariff schedule, the carrier could not have availed itself of the benefit of its limitation to an agreed valuation. Union Pac. R. Co. v. Burke, 255 U.S. 317, Boston & M. R. R. v. Fifer, 246 U.S. 439, and Cincinnati, N.O. & T.P.R. Co. v. Rankin, 241 U.S. 319, are cited in the Hartzberg case. In the Union Pacific case it was said: "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U.S. 331, 338 and 246 U.S. 439, 444, supra), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given--where 'the rate was tied to the release.'" The court concluded by saying: "Having but one applicable published rate east

of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the Uniform Bill of Lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law.

To allow the contention of the petitioner, would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensation privilege."

In A.C. Lawrence L. Co. v. Compagnie Generale Transatlantique, 18 F.(2d) 930, the court, recognizing the right of carriers by contract clauses fairly entered into and fair and reasonable in their provisions, to limit amounts for which they should be liable, held, however, that alternative rates for the alternative limits of liability must be in force at the time of shipment, citing Union Pacific R. Co. v. Burke, *supra*, The Kensington, 183 U.S. 263, and Hart v. Penn. R.R. Co., 112 U.S. 331. In consonance with these decisions and because defendant in its filed schedule presented no choice of rates to plaintiffs by which they might have secured full coverage or protection of their property by payment of a higher rate, we are constrained to hold that rule 8 of defendant's schedule is invalid, and that defendant's liability as a common carrier accordingly remains as at common law, where



a carrier is liable as insurer (10 Amer. Jur. p. 441, and numerous cases therein cited) for the full value of a passenger's luggage such as is usually and customarily carried by a passenger for his personal use when traveling on the carrier's conveyance. That the wardrobe trunk and its contents consisted of personal effects such as passengers could reasonably be expected to carry on a Great Lakes cruise is undisputed. The value of the steamer trunk and contents was shown to be \$890.95, and the court should have entered judgment in favor of plaintiffs for that amount. The case having been tried by the court without a jury and there being no substantial dispute as to the evidence, it would serve no useful purpose to remand the case. Accordingly, the judgment of the Superior Court is reversed and judgment is entered here in the sum of \$890.95, without interest.

Judgment reversed and judgment here

for plaintiffs in the sum of \$890.95.

Scanlan and Sullivan, JJ., concur.

44971

PEOPLE OF THE STATE OF)
ILLINOIS,)
Defendant in Error,) ERROR TO MUNICIPAL
v.) COURT OF CHICAGO.
RALPH W. OHNETH,)
Plaintiff in Error.)

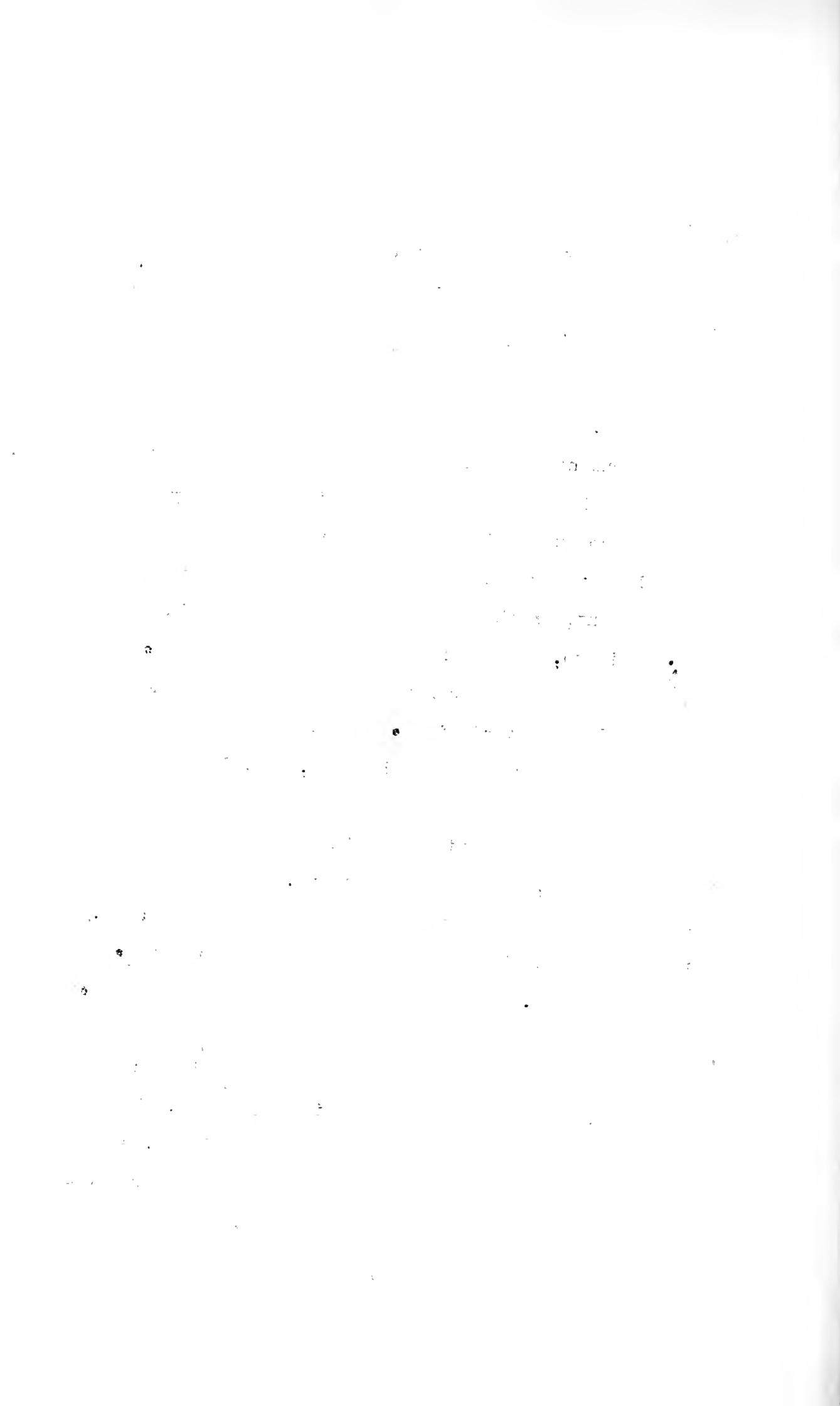
339 I.A. 247¹

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

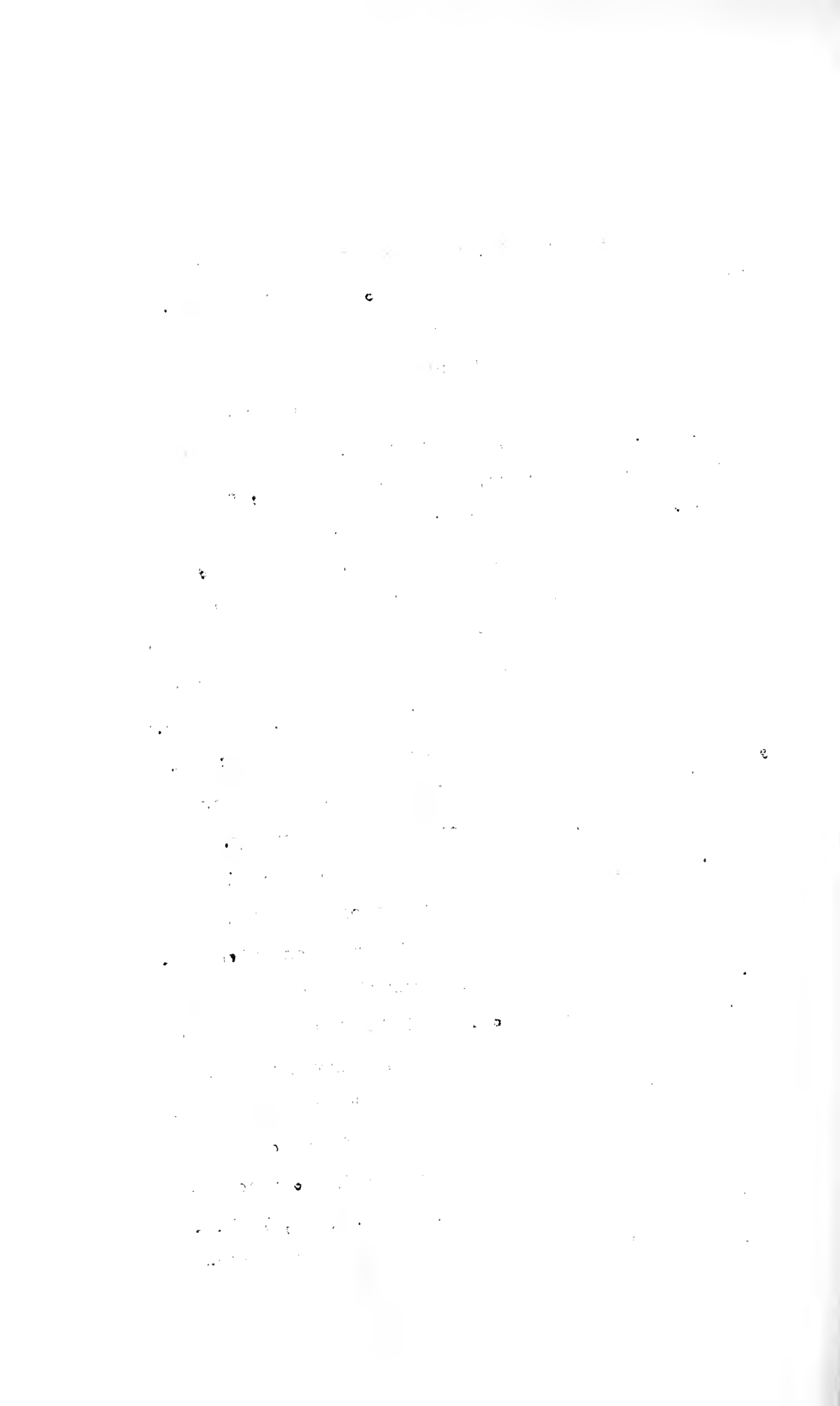
Defendant comes here on writ of error to review a
judgment of the Municipal Court finding him guilty of
disorderly conduct and imposing a fine of \$200.00.

The cause was heard on an information charging
that defendant, on the 28th day of March, 1949, in the
City of Chicago, "did then and there commit an act of
lewdness and public indecency tending to debauch the
public morals," in violation of the statutory provision
entitled Disorderly Conduct, chap. 38, par. 159, sec. 55,
Ill. Rev. Stat. 1947.

There is no dispute as to the facts. It appears
that on March 25, 1949 the complainant, Mrs. Lucy Lee,
received in the due course of the mails a letter properly
addressed to her, which was vile, highly obscene and of a
lascivious nature. Defendant concedes the transmission of
the letter through the United States mails. Shortly after
the receipt thereof complainant communicated with the
police, and, in accordance with their suggestion, when
defendant called her on the telephone a week later, she
invited him to her home. Upon his arrival he was arrested
by police officers who were waiting inside.



The sole question presented is whether the writing of a letter, however vile, unaccompanied by any violent, boisterous, turbulent or other act of a public nature, is sufficient upon which to predicate a conviction of disorderly conduct. The statute upon which the information is predicated reads as follows: "Disorderly Conduct. 159. Punishment.] Section 55. Whoever shall be guilty of open lewdness, disorderly conduct, or other notorious act of public indecency, tending to debauch the public morals, shall be fined not exceeding \$200." (Ill. Rev. Stat. 1947.) Aside from the fact that the letter was turned over to the police after defendant's arrest, there is no evidence that any person other than the complainant had knowledge of its contents. The means of conveyance used, as well as its contents, clearly indicates that the whole transaction was private and not public in character. In City of Chicago v. Murray, 333 Ill. App. 233, where defendant was found in a hotel room under circumstances pointing to an act of adultery, the only parties present were defendant's male companion and, later, her husband, who upon entering the room shot and fatally wounded the companion. We held that the evidence was not sufficient to warrant a finding that defendant was guilty of "disorderly conduct" or a "diversion tending to a breach of the peace" under the Municipal Code of Chicago, and cited numerous cases supporting our conclusion, including People v. Monnier, 280 N.Y. 77, 19 N.E. 2d 789, wherein it was held that "acts charged as dis-



orderly conduct must be public in character, and such as actually do tend to disturb the public peace and quiet"; and also City of Chicago v. Hansen, 337 Ill. App. 663 (Abst.).

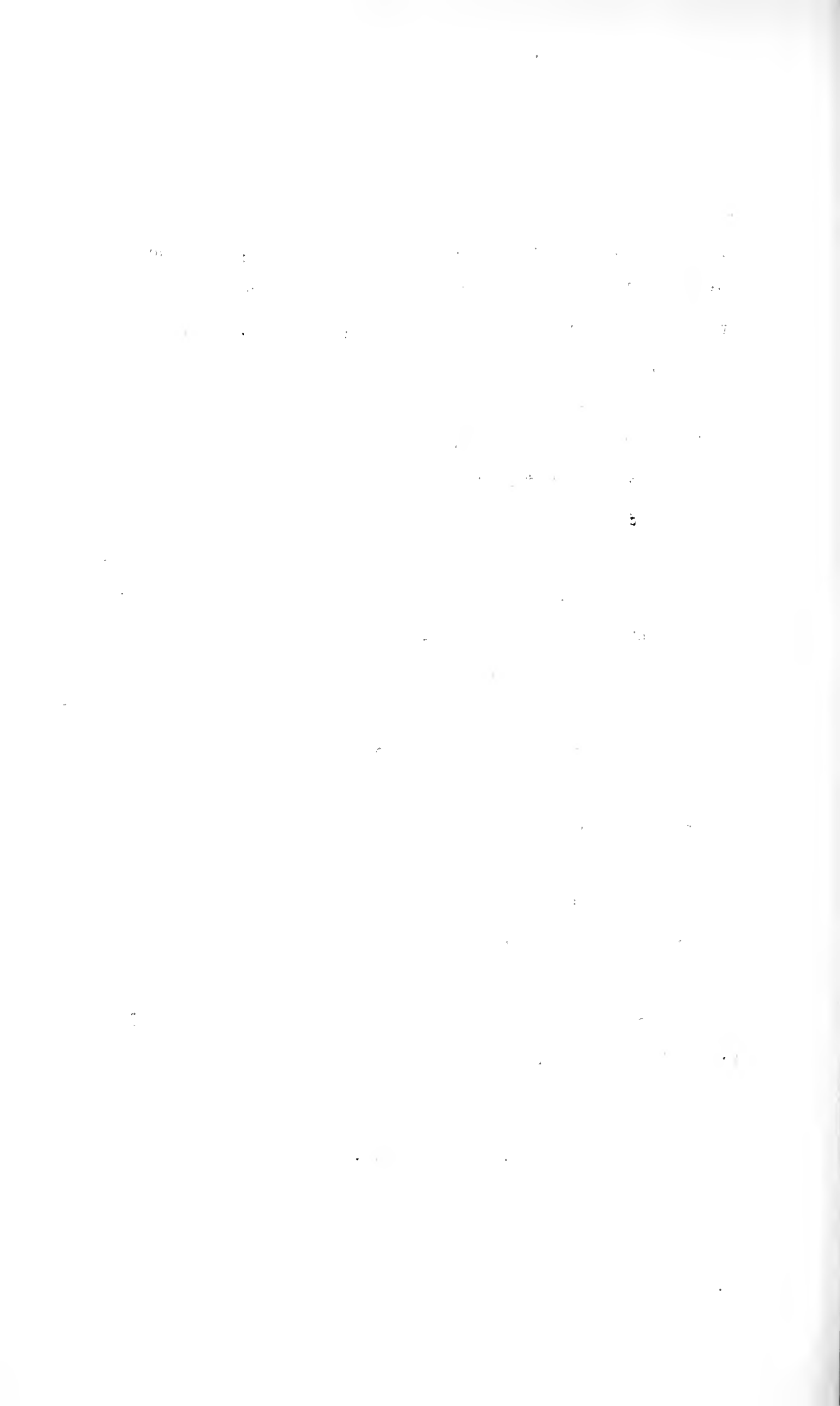
It is urged on behalf of The People that the complainant was not a willing participant in the act, as were the principals in the Murray and Hansen cases. However, the rule in these cases was not based on whether the conduct charged met with the favor or disfavor of the principals involved, but on the fact that the acts were private and not public in character.

We certainly give no sanction to the vile letter written and mailed by defendant. If he violated any Federal statute relating to the misuse of the mails, the state's attorney should place the letter in the hands of the postal authorities for attention. We merely hold, in accordance with our former decisions and the clear weight of authority, that defendant's act did not constitute disorderly conduct within the statute or as charged in the information upon which he was tried.

For these reasons the judgment of the Municipal Court is reversed.

Judgment reversed.

Sullivan and Scanlan, JJ., concur.



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INTERLOCUTORY

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

939 I.A. 247²

On January 7, 1946, Jacob Kaplan, plaintiff (hereinafter called plaintiff), filed his complaint against Hyman C. Kaplan, defendant (hereinafter called defendant), and others. The complaint alleged that plaintiff and defendant were engaged in the scrap metal business under the name of Kaplan Salvage Co., that a certain instrument purporting to transfer plaintiff's interest in the business to defendant was fraudulent and void and that defendant was appropriating partnership assets to his own use. The complaint prayed that the instrument be declared void, that defendant be required to account, and that a receiver be appointed for the business. The case was referred to Master in Chancery Mannion, who took evidence and filed his report. From the report the following facts appear: Plaintiff and defendant are father and son. In 1899

plaintiff commenced the business of dealing in industrial scrap metals. Prior to 1926 defendant had worked for a printing concern and also for a taxicab company. In 1926 plaintiff gave defendant a truck in order to give him a start in the scrap metal business and shortly thereafter plaintiff and defendant formed a partnership, which was conducted under the name of Kaplan Salvage Co. The relationship between father and son was at that time very close. The father reposed absolute trust and confidence in the son. Both parties were active in the business, but defendant operated the business as he saw fit. There is no question but that the son dominated and controlled his father in their business relationship and plaintiff entrusted the management of the business to defendant. On January 1, 1938, defendant instructed the bookkeeper to have the books of the company show that defendant was the sole owner of the company and that plaintiff was an employee of the company in the capacity of superintendent. Plaintiff had never examined the books and records of the company and had no knowledge that the books were so kept. Defendant, without the knowledge of plaintiff, had certain real estate purchased by the partnership conveyed into defendant's name. Defendant is the son of plaintiff by a first marriage and he and the second wife of plaintiff did not "get along." In the summer of 1938 defendant told his father that in the event of the latter's death the second wife would cause defendant considerable trouble and that he wanted his father to sign papers so that after



the father's death the business would belong to defendant, but if the father would sign said papers plaintiff and defendant would still continue as partners until the father died and that the transfer was to take effect only upon the death of plaintiff. When plaintiff asked what would happen to his family after his death, defendant replied, "You can trust me, I will take care of them." In September, 1938, defendant took plaintiff to an attorney who drafted an instrument which purported to transfer plaintiff's interest in the partnership to defendant. The question of the support of plaintiff's family upon plaintiff's death again was raised and defendant stated that such support would have to be left to his discretion. The attorney then advised plaintiff not to sign the agreements and defendant took away the unsigned documents. Plaintiff has a wife and five daughters by his second marriage and has no assets other than his interest in Kaplan Salvage Co., and no income other than his income from that company. Defendant kept after plaintiff to sign the documents and finally succeeded in procuring plaintiff's signature to the documents. Plaintiff states that he does not remember signing the documents and defendant did not explain the circumstances under which the documents were signed. Defendant retained all copies of the document. Although defendant had secretly instructed the bookkeeper to have the books show defendant as sole owner, still, until 1942 defendant recognized plaintiff's equal interest in the business, and the

profits were allocated equally between them. Commencing in 1942 defendant began to withdraw more than his share. During the years 1942 to 1945 he withdrew approximately \$42,000 in excess of the amounts received by plaintiff and he also personally retained \$16,500 from the sale of partnership real estate. Certain assets acquired with partnership funds were taken in defendant's own name and were claimed by him as his own. Plaintiff protested defendant's excessive withdrawals and defendant sought to reassure plaintiff, but defendant finally claimed that he was the sole owner of the business because of the document signed by plaintiff, and that plaintiff had no interest whatever in the business. The master found that "the evidence shows, beyond all doubt, the utter lack of good faith on the part of said defendant," and recommended the entry of a decree in accordance with the prayer of plaintiff's complaint. On February 2, 1949, the chancellor entered an order overruling the exceptions filed to the master's report and approving the master's report, and "ordered that a decree be presented in accordance with said Master's report."

On February 10, 1949, plaintiff moved for the entry of a decree and the motion was continued to February 14, 1949. On February 11, 1949, plaintiff and his attorney and defendant and his attorney "appeared before the court, in chambers, and the court in a discussion relating to a possible settlement of this litigation, stated that

upon application of plaintiff he would appoint a receiver for Kaplan Salvage Co., and all parties in the course of said discussion then representing to the court that the appointment of a stranger as receiver would ruin the business of Kaplan Salvage Co., the court stated that he would appoint plaintiff as receiver upon such application being made; that attorney for plaintiff thereupon stated that the decree to be presented to the court would reserve jurisdiction for the appointment of a receiver and that upon entry of the decree plaintiff would make application for the appointment of a receiver." During the course of the discussion defendant made a remark concerning plaintiff which the chancellor considered so highly offensive that he ordered defendant to leave the chambers immediately. On February 14, 1949, the chancellor heard oral arguments in respect to the entry of a decree and postponed further hearing of the matter to February 15, 1949, at which time the parties appeared before the chancellor and the decree was then entered. It decreed, inter alia, that the agreement purporting to transfer plaintiff's interest in the partnership was null and void, that plaintiff and defendant have an equal interest in the partnership, that defendant should account to plaintiff for all sums withdrawn in excess of his share, that the cause be rereferred to the master for such accounting, that defendant convey and transfer to the partnership certain assets held in defendant's name, and that the court reserves jurisdiction to enforce the decree

and appoint a receiver. At that time counsel for plaintiff made an oral motion for the appointment of plaintiff as receiver of the business operated as Kaplan Salvage Co. and the chancellor stated that if written application were so made by plaintiff the following day he would appoint plaintiff receiver. The chancellor stated, in open court, after the entry of the decree, that he was prejudiced against defendant because of the offensive remark made by defendant at the meeting in chambers on February 11, 1949; that after appointing plaintiff as receiver he would, of his own motion, transfer the cause to the executive committee of the court for reassignment to another judge for hearing. On February 16, 1949, at the opening of court, defendant presented a petition for a change of venue and plaintiff immediately presented a written petition for the appointment of plaintiff as receiver. The court first entered the order appointing plaintiff receiver and then allowed the petition for change of venue.

Defendant contends that "upon the presentation of a petition for change of venue, in proper form, and on due notice, the judge from whom the change of venue is taken is without jurisdiction to enter any order except such as may be made in connection with the change of venue. Agar Packing & Provision Corporation v. United Packinghouse Workers, 311 Ill. App. 502, at 505-507." Defendant further contends that "the trial court erred in appointing plaintiff as receiver, and that such order

ought to be reversed."

In Comrs. of Drainage Dist. v. Goembel, 383 Ill. 323, the court stated (p. 328): "The petition in this case for a change of venue appears to be in proper form and was duly verified as required by statute. The controlling question is as to whether it was filed in apt time.

"A petition for a change of venue must be made at the earliest practicable moment. (Ossey v. Retail Clerks' Union, 326 Ill. 405; McClelland v. McClelland, 176 Ill. 83; Haley v. City of Alton, 152 Ill. 113.) An application made after the hearing started comes too late. (Ossey v. Retail Clerks' Union, 326 Ill. 405; Richards v. Greene, 78 Ill. 525; Hudson v. Hanson, 75 Ill. 198.) The reason that supports the rule is obvious. It would be highly improper to permit an attorney representing parties to a suit to try out the attitude of the trial judge on a hearing as to part of the questions presented and, if his judgment on such questions was not in harmony with counsel's view, to then permit counsel to assert that the court was prejudiced and that a change of venue must be allowed." (Italics ours. See, also, Russell v. Russell, 333 Ill. App. 68, 87.)

In Agar Packing & Provision Corporation v. United Packinghouse Workers, supra, cited by defendant, it appears that the application for a change of venue was made at the earliest practicable moment and that at that time no adverse rulings had been made against the defendant. In the instant case the complaint prayed for the appointment of

a receiver, and the master in his report recommended the entry of a decree in accordance with the prayer of the complaint. The chancellor, after a consideration of the report, the written briefs submitted by the parties, and the oral arguments of counsel, on February 2, 1949, approved the master's report and ordered that a decree be presented in accordance with the report. In the conference in the chancellor's chambers on February 11, both parties stated to the chancellor that the appointment of a stranger would ruin the business of the company, and thereupon the chancellor stated that he would appoint plaintiff as receiver, upon a written application to be made by plaintiff. We are satisfied that defendant's petition for a change of venue was not made at the earliest practicable moment and if the chancellor, on February 16, 1949, had first passed upon the petition for a change of venue, in accordance with correct practice he would have been obliged, under the law, to deny the petition, and the chancellor would then have jurisdiction to enter the order appointing plaintiff receiver. That the chancellor followed an irregular procedure may be conceded, but defendant was not injured thereby. It must be remembered, however, that on February 15, 1949, when the chancellor stated "that he would appoint the plaintiff receiver of the business operated as Kaplan Salvage Company, if written application were so made by the plaintiff the following day," he also stated "that he would, of his own motion, after appointing plaintiff

as receiver, * * * transfer this cause to the executive committee of this court, for reassignment to another judge for hearing." The record also shows that no objection was then made by defendant to the intended procedure. It must also be remembered that plaintiff and defendant stated to the chancellor that if he appointed a stranger as receiver it would ruin the business of the company, and the only reasonable inference from their statements is that the chancellor should appoint as receiver either plaintiff or defendant. Under the record in this case the chancellor could not, in good conscience, appoint defendant receiver.

The interlocutory order of the Circuit court of Cook county entered February 16, 1949, is affirmed.

INTERLOCUTORY ORDER ENTERED
FEBRUARY 16, 1949, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

44815

MARIE J. KUZMA, etc.
On appeal of Marie J. Kuzma,
Appellant,

v.

WILLIAM T. BARBER, 63rd & KEDZIE
BUILDING CORPORATION, a corporation,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

339 I.A. 248

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action under the Dram Shop Act against the several defendants, alleging that George Kuzma, her husband, came to his death as a result of intoxication, due in whole or in part to the liquor sold him by the defendant tavern owners. The liability against the building corporations, under the Dram Shop Act, was on the basis of their ownership of the premises where the liquor was sold and having leased said premises for the sale of liquor. Before the conclusion of the trial with a jury, defendant The Chicago Lawn, Inc. was dismissed out of the case. At the conclusion of the evidence for plaintiff, defendants asked and were given leave to file an additional answer setting up a release executed by plaintiff to The Chicago Lawn, Inc., and a verdict of not guilty was directed as to the remaining defendants and judgment entered upon such verdict, from which plaintiff appeals.

Plaintiff was asked upon cross-examination the following questions and gave the following answers:

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"Q. Now you say you received from the Chicago Lawn, Inc., a corporation, the owner of the building where Isabel's Tavern was located, a thousand dollars on account of the case, is that right, on account of the death? A. Yes.

"Q. And you don't have any claim now against Isabel O'Neil, Peter Smith or the Chicago Lawn, Inc., do you? A. No, sir.

"Q. When did you receive this money that you refer to? A. Last year.

"Q. What time last year? A. I think about in June---June, or---

"Q. That would be in June of 1947? A. I think so, yes."

Substantially the same questions and answers were given on cross-examination in Wallner v. Chicago Traction Co., 245 Ill. 148, 150, and were held to be sufficient to establish the release of a joint tort feason, and that if the answers given by the witness could be explained away, it was incumbent upon plaintiff to explain. Having failed to do so, the answers of the witness must be given their ordinary meaning.

In the instant case, when the defendants were given leave to file the additional answer setting up the special defense of release, the opportunity was open to plaintiff to ask time to file a reply to the answer, denying the facts set up in the answer, or if no such release was given, as pleaded and as testified to by plaintiff, to produce the instrument itself, which plaintiff failed to do.

Under these circumstances the holdings in Wallner v. Chicago Traction Co., supra, and Cox v. Aetna Casualty Co., 286 Ill. App. 515 (leave to appeal denied by the Supreme

3.

Court), justified the trial court in directing a verdict for the defendants. Accordingly, the judgment is affirmed.

AFFIRMED.

Tuohy, P. J., and Niemeyer, J., concur.

44863-44864 (Consolidated)

LOUIS KUENAZKES,
Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,
et al.

HARRY J. KEENAN,
Appellant.

LOUIS KUENAZKES,
Appellant,

v.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,
et al.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,
Appellee.

44863 APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

44864 APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE
COURT.

Plaintiff brought this action against both defend-
ants for personal injuries alleged to have been caused by
the negligence of the defendants. Upon a trial with a
jury a verdict was returned in favor of plaintiff against
the Chicago Transit Authority for \$5,000 and not guilty
as to defendant Keenan. Defendant Transit Authority made
its motion for judgment notwithstanding the verdict and
in the alternative for a new trial. The court granted
the motion for a new trial, from which plaintiff appeals.
Plaintiff filed his motion for a new trial as to the
defendant Keenan, and the court allowed the motion, from
which defendant Keenan appeals. Both appeals have been
consolidated for hearing.



As to the defendant Keenan, plaintiff upon oral argument confessed error, and upon the confession of error the order of the trial court granting plaintiff a new trial is reversed and the cause remanded with directions to enter judgment upon the verdict.

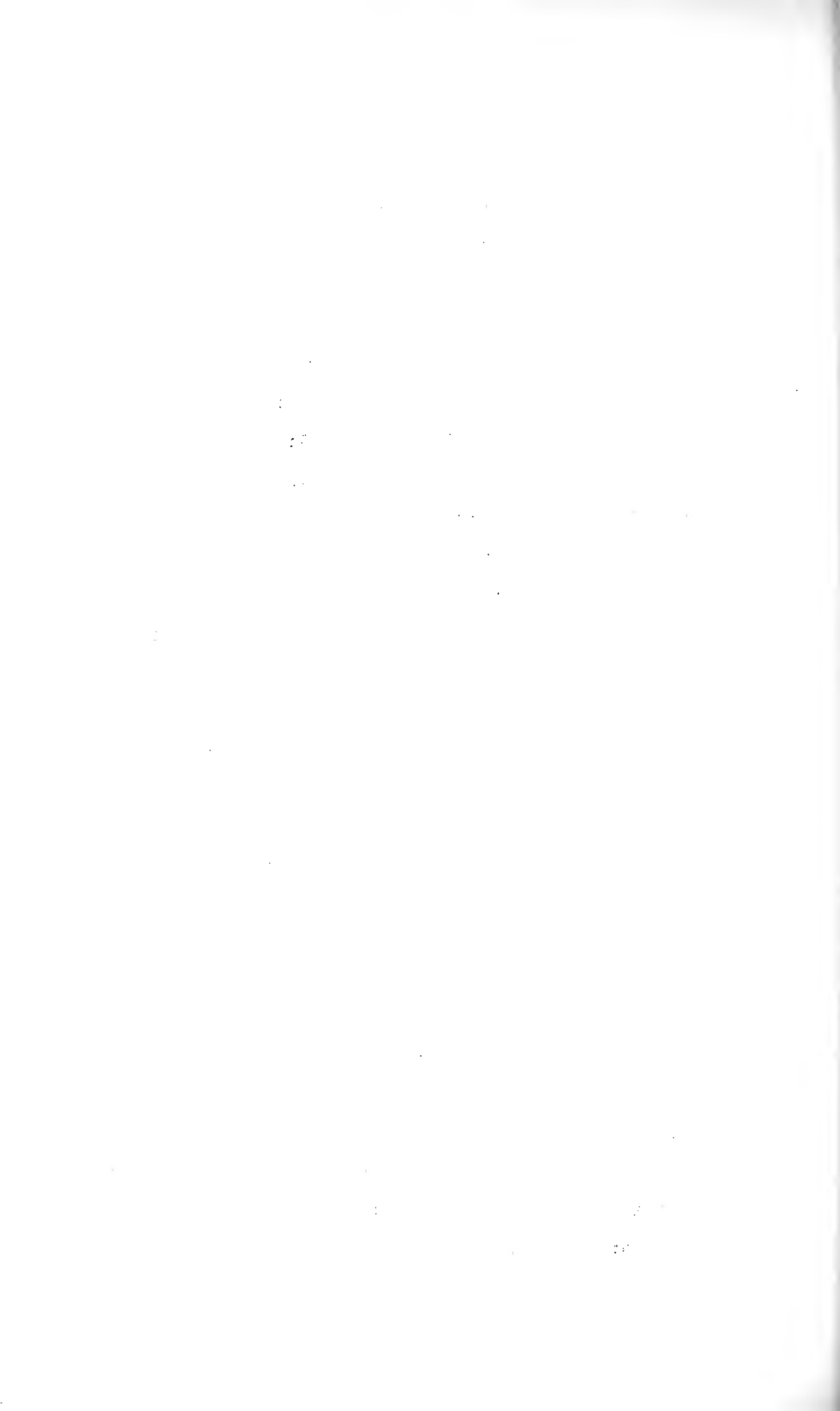
It appears from the evidence that on the morning of December 24, 1945, about 6:30 A.M., while still dark, plaintiff was standing on a safety island on Ashland avenue at Cortez street in Chicago, waiting for a southbound streetcar. Defendant Transit Authority was operating a snow plow on the southbound streetcar track of Ashland avenue. Plaintiff and defendant Keenan both testified that the force of the operation of the snow plow threw snow and debris over the west curb of Ashland avenue, and on the sidewalk. Plaintiff further testified that some of this snow was thrown upon him by the plow, which blinded him and forced him off of the safety island, to the west into the street, where he was hit by defendant Keenan's automobile. It was snowing heavily at the time.

Defendant Keenan also testified that the brushes on the snow plow were operating as it went past the safety island upon which plaintiff was standing; that he was driving his car between 10 and 12 miles per hour and suddenly saw a dark figure through the cloud of snow that was thrown up by the plow, too late to stop his car from striking plaintiff; that he stopped within a few feet after he struck plaintiff.

The motorman on the snow plow, testifying for defendant Transit Authority, testified that he saw someone standing on the safety island when his snow plow was 25 feet to the north of the island, and that he saw some man run to the west but did not see the accident. He admitted that the brushes on the snow plow were operating as it went past the safety island. The Transit Authority disclaims negligence and claims that the injuries were the result of plaintiff's contributory negligence.

It is without dispute that the safety island in the street adjacent to the southbound tracks was the proper place for plaintiff to stand to board defendant's streetcar. It is without dispute that the motorman on the snow plow saw plaintiff when the snow plow was 25 feet away and was traveling about 5 miles an hour.

The other witness for the defendant Transit Authority was also a motorman, assigned to handle the wing of the plow and to take care of the trolley. He, too, saw someone standing on the safety island when they were about 25 feet away from the island. The two witnesses for the Transit Authority denied that the snow was thrown with such force by the plow in question as to throw it over the west curb and on the sidewalk and testified that there was a canvas covering over the plow to prevent the snow from being thrown up in the air, but they did admit that the snow by force of the operation was thrown at least 2 feet away from the plow. Defendant had ample time to shut off the operation of the



plow before it reached the safety island, and plaintiff had a right to expect that the defendant, who saw him standing on the safety island, would do so. If a safety island, under such circumstances, is not a safe place for the plaintiff to stand and wait for a streetcar, rightfully expecting defendant to exercise reasonable care to prevent injury to him, then calling it a safety island is clearly a misnomer.

Upon this state of the record, it is clear to us that the questions of alleged contributory negligence of the plaintiff and negligence of the defendant were essentially questions of fact for the jury, and it was entirely within their province to determine these questions. Having determined them, the trial judge had no right to interfere with the verdict unless he could say that it was against the clear preponderance or manifest weight of the evidence. That the trial judge may have decided it differently, had it been submitted to him without a jury, does not justify him in granting a new trial. Read v. Friel, 327 Ill. App. 532, 538. The discretion that he exercises in passing upon a motion for a new trial must be a reasonable one. It must not be arbitrary. Necheles v. Jefferson Ice Co., 336 Ill. App. 153.

A review of the evidence in the record convinces us that the trial judge was not justified in interfering with the verdict of the jury and that the evidence amply supports the verdict. Accordingly, the order granting a new trial as to the Transit Authority is reversed and the cause re-



-5-

manded for further proceedings in conformity with this opinion.

ORDERS OF THE CIRCUIT COURT
REVERSED AND REMANDED WITH
DIRECTIONS.

Tuohy, P. J., and Niemeyer, J., concur.



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APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

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339 L.A. 249

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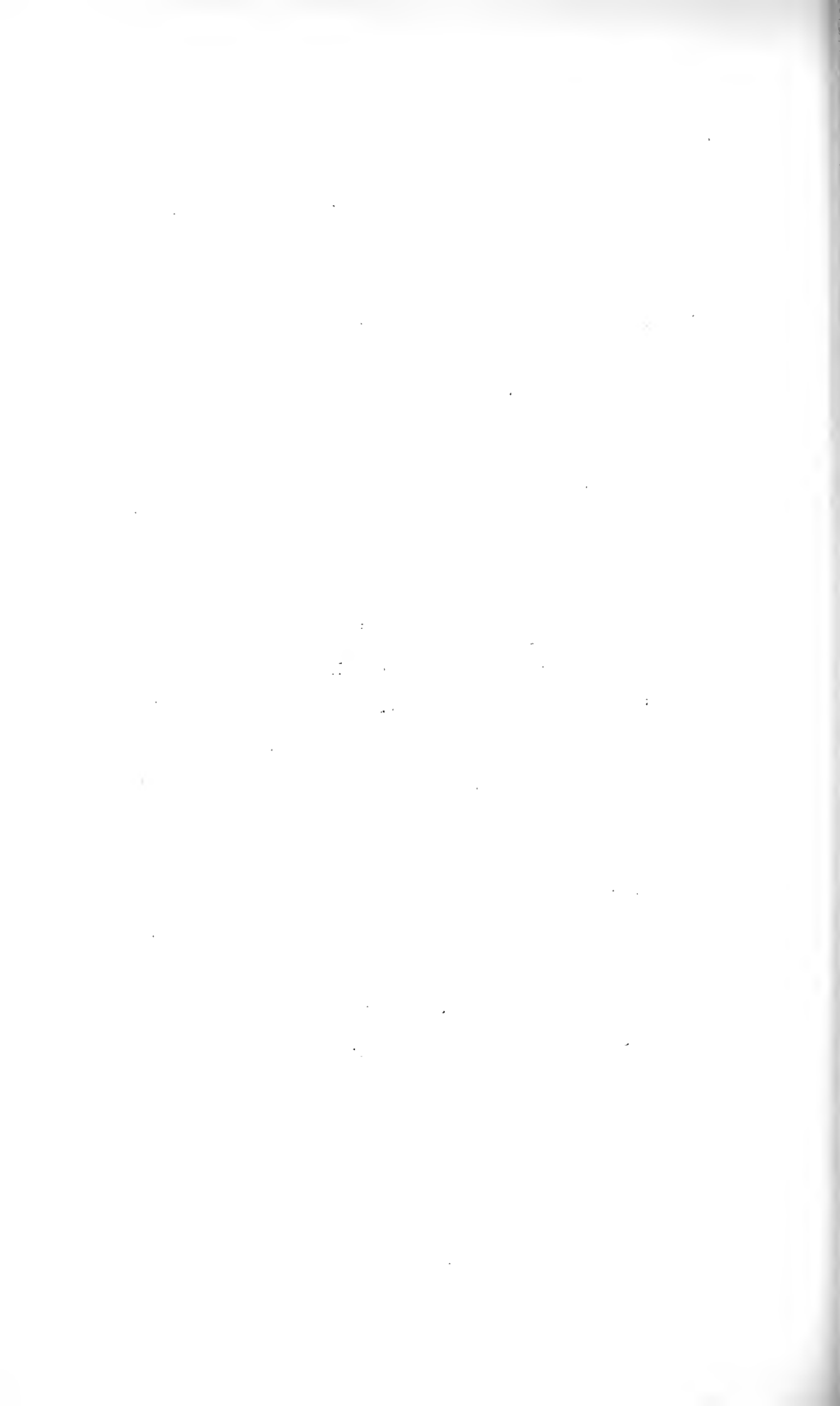
The cause was heard by the chancellor upon the pleadings and evidence, and a decree was entered in favor of plaintiffs for the cancellation of the note and trust deed in question, from which defendant Di Carlo appeals. We have not had the benefit of a brief for plaintiffs upon this appeal.

It clearly appears from the evidence that Hirschberg approached plaintiffs in September, 1944, and interested them in the purchase of the real estate in question; that he represented he was the agent of the then owner, and upon their willingness to purchase, he had plaintiffs sign papers, which he represented were necessary to send to Springfield to get title to the property. The purchase price was to be \$2500. They made a down payment to him of \$300, and a month later they paid him \$300 more and he then told them that he needed an additional \$200, for which he had them sign some papers. It later developed that among the papers Hirschberg had plaintiffs sign, and of which they had no understanding, was a note for \$1739.11, dated January 10, 1945, secured by a junior trust deed upon the real estate in question, payable \$15 on the first day of February, 1945, and a like amount on the first day of each and every month beginning March 1, 1945, for fifty-nine months succeeding, the balance to be paid March 1, 1950, with interest at 6% per annum. It further appears that ultimately, instead of the sales price being \$2500 as claimed by plaintiffs, the total indebtedness appearing from the instruments

they signed, submitted by Hirschberg, and of which they had no understanding, totaled \$3800. The junior trust deed recited that it was subject to a first mortgage which was filed of record December 15, 1944. The payments provided for in the note and junior trust deed were to be made at the office of Hirschberg. It also appears from the evidence that Hirschberg was convicted in the Criminal Court of Cook County on a charge of embezzlement, and when he testified he was then serving his sentence in the Illinois penitentiary. Defendant Di Carlo was an office associate of his and had a number of transactions with him. He claimed to have purchased the note and junior trust deed in the latter part of May or the first part of June, 1945. Hirschberg testified that the payments that became due prior to the time Di Carlo purchased the note and trust deed in question had been paid by the plaintiffs. Plaintiffs emphatically denied this statement and said they had never paid anything on this junior mortgage and note and knew nothing of it until demand for payment was made by some attorney on behalf of Di Carlo. It further appears that instead of Hirschberg being an agent of the owner of the real estate he had title to the property in his own name.

Di Carlo, in his amended answer and counterclaim, sought not only a decree declaring him to be the owner of the note and trust deed in question but foreclosure of the junior trust deed for the existing default.

It is true that one may be an innocent holder



in due course of a note secured by trust deed, and the fact that the note recites on its face that it is secured by a trust deed does not affect the status of the holder. The Negotiable Instruments Act is applicable to such a note. In re Estate of Wedelius, 266 Ill. App. 69, 76; Justice v. Stonecipher, 267 Ill. 448, 451. When, however, one seeks to foreclose a mortgage and a decree for the amount due on the mortgage note it then becomes subject to all equitable defenses, and all equitable claims which could have been asserted against the original holder may then be asserted against the note and mortgage. Lauf v. Cahill, 231 Ill. 220.

If the chancellor upon the evidence was justified in holding that the facts and circumstances showed that Di Carlo was not an innocent holder of the note and trust deed in question, and that Hirschberg was guilty of such fraud as justified a cancellation of the note and trust deed, then we should not disturb the decree unless we can say it is against the manifest weight of the evidence. The chancellor saw and heard the witnesses. The strong circumstances disclosed by the evidence, that Di Carlo was an office associate of Hirschberg; that he had intimate business relations with him; that when he obtained the note he paid only \$1,000, and that in currency; that the note on its face provided for payments due prior to his acquisition of the note and he made no inquiry of the makers as to whether the payments had been made or whether the note was then in default, when by simple

inquiry he could have ascertained the fact; bearing in mind that plaintiffs emphatically denied that they ever paid any money on the note; the further circumstance that when Di Carlo received the note and trust deed from Hirschberg in May or June of 1945 the trust deed was not then recorded and was not recorded until September 17, 1946, although the note and trust deed were dated January 10, 1945, a circumstance that should have provoked inquiry by Di Carlo; and the unusually large discount at which Di Carlo purchased the note and trust deed, in our judgment fully justified the chancellor in reaching his conclusion.

In Auten et al. v. Gruner, 90 Ill. 300, 302, it was said:

"The fact such a dealer presented the notes of farmers, residing in the vicinity, for sale at an unusually large discount for good paper, was itself a suspicious circumstance, and was enough to awaken inquiry in the mind of any reasonably cautious person as to the consideration, before buying. Such inquiry could readily have been made, as the maker resided in the vicinity of the village, and the truth ascertained."

We cannot say that the decree is against the manifest weight of the evidence. Accordingly, it is affirmed.

DECREE AFFIRMED.

Tuohy, P. J., and Niemeyer, J., concur.

44736

C. D. JENNINGS AND COMPANY,

Appellee,

v.

FULTON MACHINE COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

339 I.A. 250¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$1,604.06, entered after trial before the court on plaintiff's claim for balance due on contract price of \$4,100 for a lot of jigs, fixtures and gauges to be made by plaintiff for the purpose of machining 600 brass castings for defendant, and from judgment for plaintiff on defendant's counterclaim alleging breach by plaintiff of its contract to machine the brass castings. Plaintiff has cross-appealed because of the failure of the trial court to allow it a balance of \$2,069.29 for work done on the brass castings before the termination of the contract.

The contract was a war contract. The Western Electric Company, having contracted to supply certain brass castings, entered into a contract with defendant to machine the castings. Defendant sublet this work to plaintiff under a contract providing for the payment of \$4,100 for the jigs, fixtures and gauges to be used in machining the castings, and the payment of \$21.50 for machining each casting. The jigs, fixtures and gauges were made after consultation with defendant and the Western Electric Company. Several machined castings were submitted by plaintiff to the Western Electric

Company, who rejected the castings, claiming that the tolerance of .004", permitted by the drawings, had been exceeded. Plaintiff claimed that the method of inspection employed by the Western Electric was not in accordance with the drawings submitted when the contract was entered into. Experienced engineers testifying for the respective parties placed conflicting constructions upon the drawings, and the court in announcing his decision said that it seemed to him that plaintiff "did not have and was not given the proper information with reference to what the surfaces (of the castings) should be." We cannot say that this conclusion is against the manifest weight of the evidence. The judgment, therefore, as to the balance due for making the jigs, fixtures and gauges must be sustained.

It necessarily follows that plaintiff was justified in ceasing work under the contract and that the court erred in not allowing it the sum of \$2,069.29, balance due for work done ⁱⁿ ~~machining~~ castings up to the termination of the contract. The testimony on behalf of plaintiff as to this work is uncontradicted. From the above mentioned finding of the court it also follows that the court properly denied any relief on defendant's counterclaim. The judgment appealed from is reversed and judgment for plaintiff is entered here for \$3,673.35.

JUDGMENT REVERSED AND JUDGMENT
FOR PLAINTIFF HERE.

TUOHY, P.J. AND FEINBERG, J. CONCUR.

44796

MYRON ROYSTER,

Respondent - Appellee,

v.

MAUDE ROYSTER,

Petitioner - Appellant.

APPEAL FROM

CIRCUIT COURT

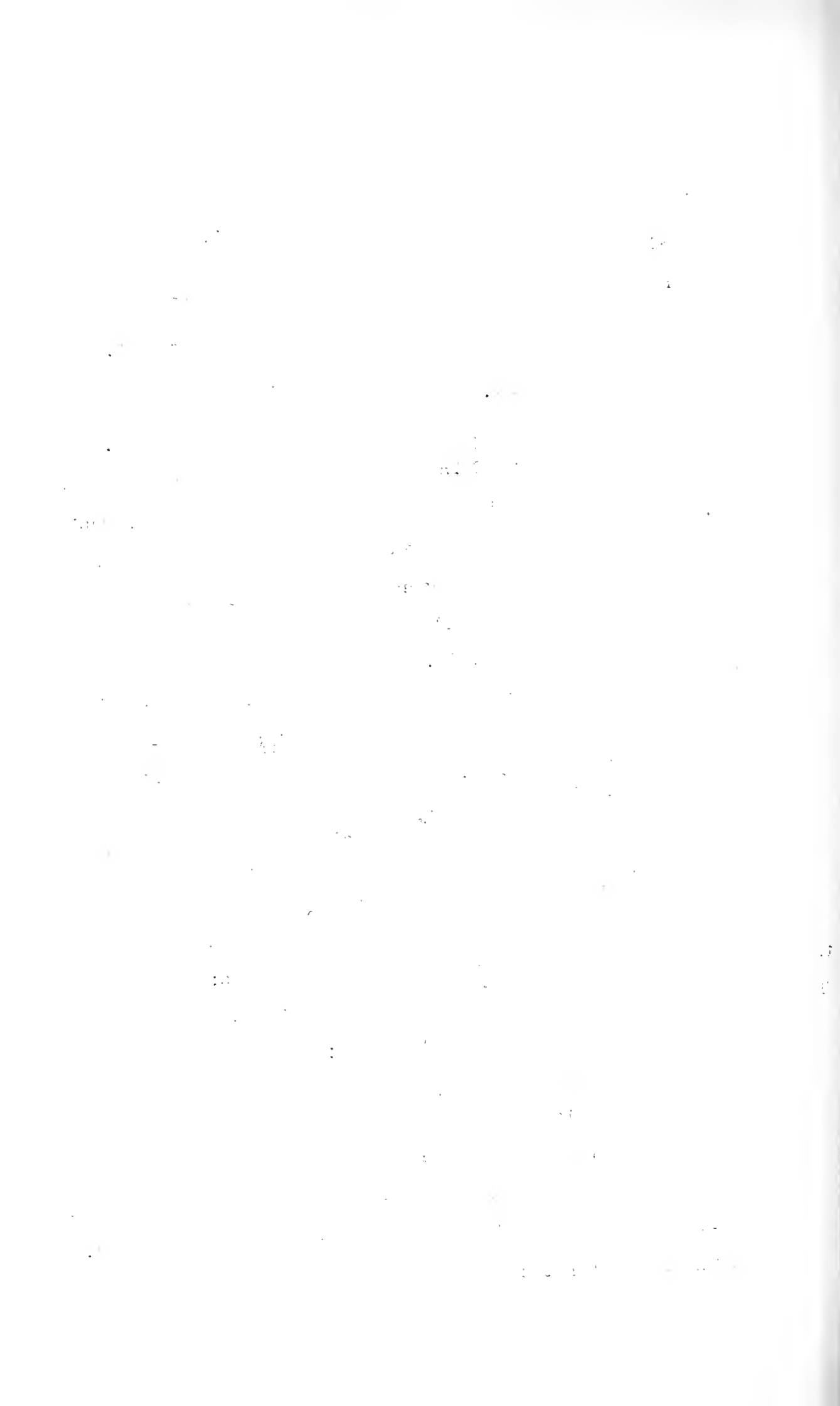
COOK COUNTY.

3391.A.250²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant and counter-plaintiff, hereafter referred to as petitioner, appeals from an order dismissing for want of equity her petition, filed October 10, 1947, asking that plaintiff show cause why he should not be held in contempt for failure to pay a balance of \$1,464 under decree of divorce entered January 31, 1935 on petitioner's counter-claim, and that in the event it develop that plaintiff was beyond the jurisdiction of the court, that a judgment be entered against him for that amount.

It appears that petitioner was granted custody of the two minor children of plaintiff and herself; the decree directed that plaintiff pay her the sum of \$10 per week for the support, maintenance and education of the children; that this sum was paid until January 31, 1938, since which time plaintiff has been paying only \$30 per month; plaintiff remarried. He testified that he explained his financial condition to petitioner and that she agreed to accept \$30 per month thereafter. Petitioner contends that this agreement was to last only a short time until plaintiff could get on his feet. The reduction in support money was not submitted to the court for its approval. Plaintiff has continued the



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reduced payments and is not in default as to them. The first action in court taken by petitioner was the filing of the petition now under consideration -- 9 years after the reduced payments began. There is no allegation of any change in plaintiff's financial condition. The matter was referred to a master in chancery, who reported, recommending that the petition be dismissed. Petitioner's exceptions to the report were overruled and the order appealed from was entered.

We concede that the parties had no power to change the order of the court, and the agreement between the parties for a reduction in the support money, whether temporarily or permanently, is not binding. The court, however, had power to approve or ratify the agreement of the parties and in so doing could take into consideration the changed condition, if any shown by the record, in the finances of the parties, the delay in attempting to enforce the original decree, and the corresponding equities presented by the record. This court so held in Wolfe v. Wolfe, 303 Ill. App. 188, in considering an agreement of the parties respecting support money for a minor child. In the absence of a showing of extreme hardship upon petitioner or the minor children it seems unjust to permit her to sleep on her rights for 9 years and suddenly make a demand for a comparatively large sum of money.

The order appealed from is affirmed.

AFFIRMED.

Tuohy, P.J., and Feinberg, J., concur.

44818

CADILLAC GLASS CO., a
Corporation,

Appellant,

v.

GEORGE STRATIS and TONY
STRATIS, doing business as
Danny Boy Candy Store,
Appellee.

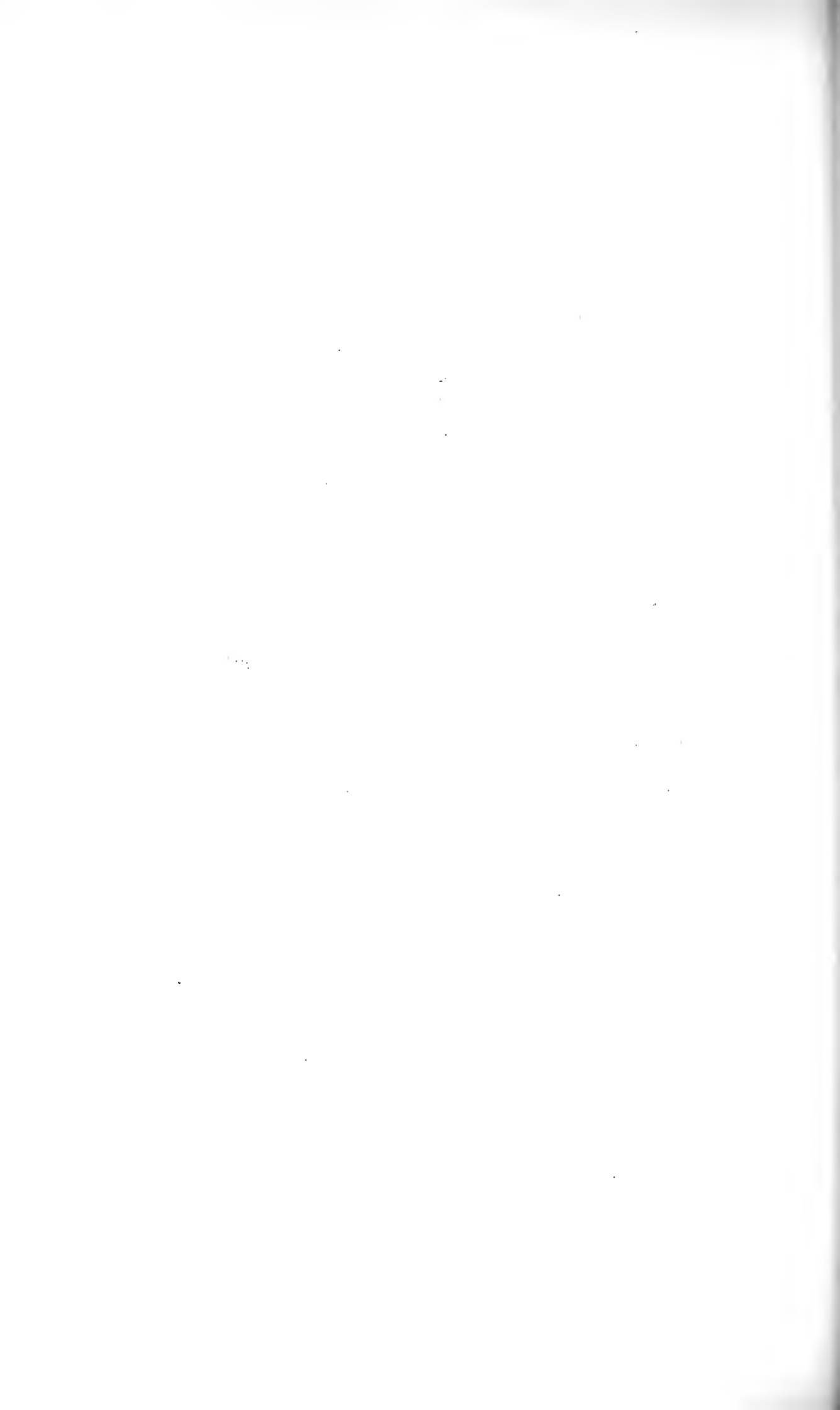
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

339 I.A. 251

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered on the petition of defendants in the nature of a writ of error coram nobis opening a judgment of the Circuit court obtained by plaintiff on its appeal from an adverse judgment before a justice of the peace and directing that the judgment opened up stand as security until a trial on the merits.

The matter was heard before the trial court on the verified petition of the defendants and the verified answer of the plaintiff from which it appears that within 20 days after the entry of a judgment for defendants by the justice of the peace plaintiff perfected an appeal by filing its bond with the justice, who, on September 24, 1948, filed the appeal in the Circuit court; that on November 5, 1948, there being no appearance on the part of the defendants, an order of default was entered and the case set for November 19, 1948, when, on hearing before the court, plaintiff's damages were assessed at \$350 and judgment entered for that amount. In their



2.

petition defendants allege "That the said ex parte judgment was erroneous and that the said appeal did not appear on any trial call of this court." The appeal having been perfected before the justice of the peace, both parties were bound to follow the appeal. Boyd v. Kocher, 31 Ill. 295; Marshall v. Lufkin, 127 Ill. App. 595; Ill. Rev. Stat. 1947, chap. 79, art. 10, sec. 1. Under former practice acts it was held that such an appeal stood for trial at a term of court commencing ten or more days after the filing of the transcript, etc., in the Circuit court. Ryder v. Meyer, 66 Ill. 40; Rider v. Bagley, 47 Ill. 365. By analogy under the Civil Practice Act appeals perfected before the justice of the peace would stand for trial after the return day 20 or more days after the filing of the appeal in the Circuit court. The appeal therefore stood for trial on November 5, 1948, when the order of default was entered. In the absence of an appearance defendants were not entitled to notice of any motion of the plaintiff or action of the court under the rules of the Circuit court.

The purpose of a petition in the nature of a writ of error coram nobis is to correct errors of fact not appearing of record. It cannot be used to correct errors of law. The petition before us alleges no error of fact and, as heretofore stated, claims that the ex parte judgment was erroneous and that the appeal did not appear upon any trial call. There is nothing in the record to show how the case appeared before the trial court when the order

3.

of default was entered. In the absence of a contrary showing it must be presumed that the cause was properly before the court.. As said in Chapman v. North American Ins. Co., 292 Ill. 179, 185:

"The error of fact alleged must not be one appearing on the face of the record or one contradicting the finding of the court. All such errors are treated as errors of the court, and the court cannot set aside a judgment entered by it for errors committed by it, after the term of court has ended. Such errors must be reviewed on writ of error proper or by appeal to an appellate or reviewing court.

It is important in considering this question to keep in mind this proposition: that the trial court cannot review itself or its own judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the term of court has ended."

The order appealed from is reversed.

ORDER REVERSED.

Tuohy, P. J., and Feinberg, J., concur.

44829

FREDERICK J. BERTRAM,
Appellant,

v.

BERNARD J. FALLON, as Trustee
for CHICAGO RAPID TRANSIT
COMPANY, a Corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT COOK COUNTY

339 L.A. 2521

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment entered after trial before the court on his complaint seeking recovery as actual damages \$5.64, alleged to represent fares in excess of the legal rate paid to the defendant, and \$100,000 punitive damages.

The Illinois Commerce Commission fixed a fare of 10 cents. The defendant instituted suit to vacate this order and procure a fare of 12 cents. The Supreme court in Sprague v. Biggs, 390 Ill. 537, held that the 10-cent fare failed to meet the operating expenses of the defendant, that it was confiscatory, and that the Attorney General and the Illinois Commerce Commission should be enjoined from attempting to enforce that fare. The trial court having failed to proceed on remandment as directed by the Supreme court, a writ of mandamus was issued (People ex rel Sprague v. Finnegan, 393 Ill. 562), the court saying:

"The effect of the remanding order was that the commission should be enjoined from requiring the utility to operate on a schedule of fares that would not produce operating income sufficient to meet operating expenses. *** The amount of the increase over the schedule of fares now in force is for the commission to determine, and

2.

after the injunction is issued by the trial court as directed in the remanding order, the commission should proceed without delay to advance the schedule of fares to such a point as to check the confiscation decided in Sprague v. Biggs by providing a return of income sufficient to meet operating expenses."

On May 23, 1946 the trial court enjoined the Attorney General and the Commission and its members from enforcing the Commission's orders requiring the trustee to keep in effect the existing rates of fare, and further provided that, "The Court taking judicial notice that by the entry of this decree and the issuance of the injunction the trustee for Chicago Rapid Transit Company will charge temporary rates of fare in excess of present rates of fare," that he keep a strict accounting of all revenues from the increased rates in the event such rates should be declared excessive and unreasonable. On the same day the defendant filed a schedule of rates of 12 cents per adult fare in the City of Chicago. It is for the excess of 2 cents per fare paid by plaintiff that he claims his actual damages.

Several hearings were had before the Commission but no order was entered as to the 12-cent fare. It is a matter of common knowledge that the fares charged by this utility have been increased at various times until the present fare ^{of} 17 cents was reached. The Supreme court having declared the 10-cent fare to be confiscatory, the Circuit court recognized the necessity of some additional charge and made ample provision for the return of any excess rate charged by defendant. The Supreme court



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expressly stated that no court of the state had the power to fix the rate. The Commission, charged with this duty, did not at any time subsequent to the filing of the schedule by defendant fix a lower rate than 12 cents. The court properly found against plaintiff and entered judgment for defendant.

The judgment is affirmed.

AFFIRMED

Tuohy, P. J., and Feinberg, J., concur.

44564

LOUISE LUCCHESI and
HELEN KETCHAM,
Appellants,

v.

C. ORSON PEMBERTON, AVIS
G. PEMBERTON, CORYDON H.
CARR, SOUTH SHORE NATIONAL
BANK, and CICERO STATE BANK,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

833 A.A. 252²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Plaintiffs appeal from that part of a decree entered
in the Superior Court dismissing the complaint as to the
defendant Corydon H. Carr.

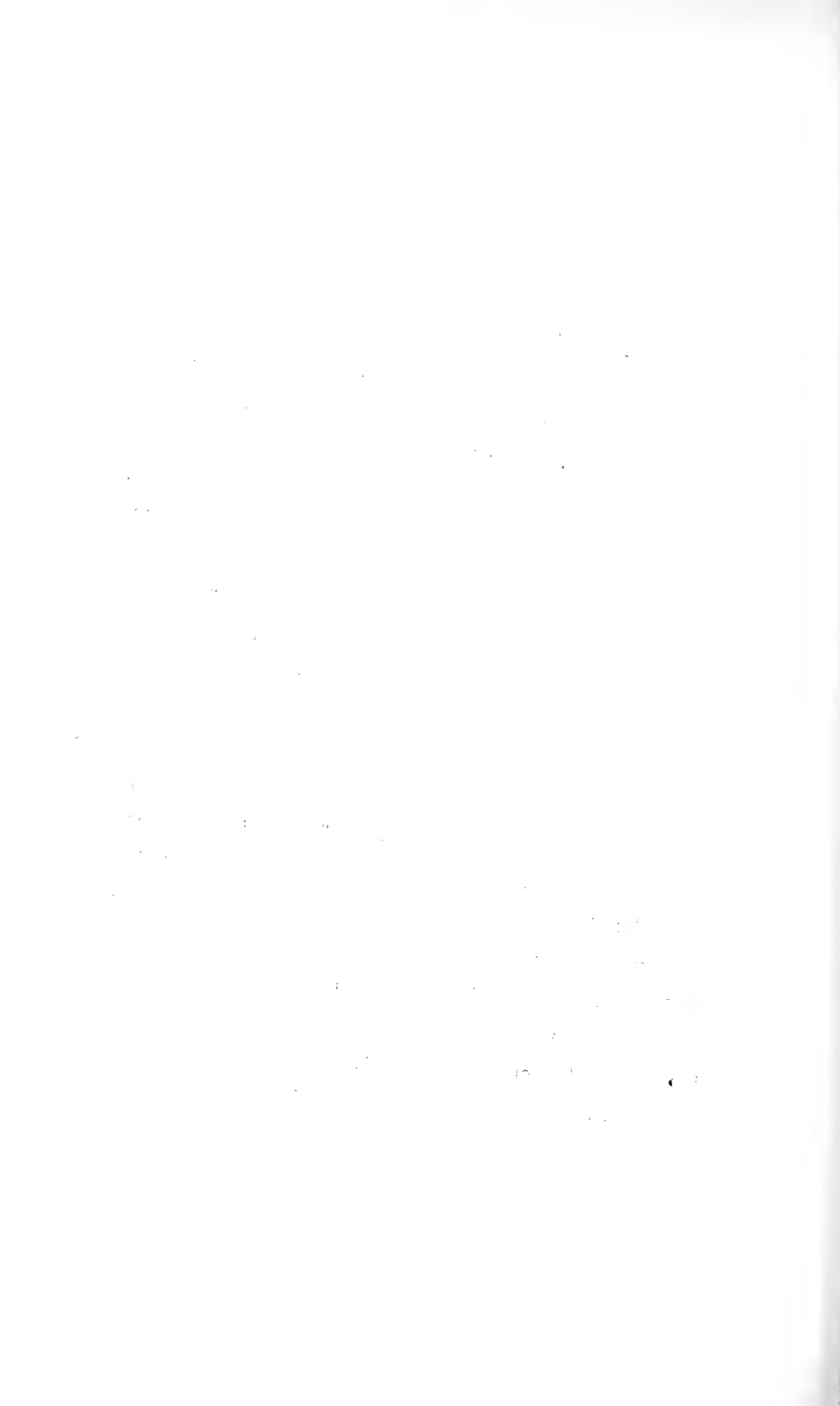
It appears from the evidence that in 1929 plaintiffs
→ obtained a judgment against C. Orson Pemberton for the sum
of \$13,580.21, interest and costs, which was revived by
→ scire facias August 26, 1946. A writ of scire facias on
the revived judgment was then issued and placed with the
sheriff of Cook County for service. The execution was
returned nulla bona on November 26, 1946, and about a
month later plaintiffs filed this proceeding, a creditor's
X suit, which was predicated on the alternative theories
(1) that at the time of the recovery of the revived judg-
ment on August 26, 1946 Pemberton was associated as a
copartner with Carr under the name of Calumet Utilities
Sales and Service Company, and that Pemberton's partner-
ship interest could not be realized by levy, but only in
a proceeding of this kind; or (2) that Pemberton wilfully,
fraudulently and secretly conveyed his interest in the
partnership to his wife Avis G. Pemberton, for the

purpose and with the intent of hindering, delaying and defrauding his creditors, especially the plaintiffs, and that Carr purchased the one-half interest in the co-partnership from Mrs. Pemberton with knowledge that such interest was not in law and in fact her property, but was the property of her husband; that Carr took a bill of sale from Mrs. Pemberton and paid her the sum of \$6015.00, which was grossly inadequate, and that the conveyance and transfer to Carr was fraudulently made with the purpose and for the intent of hindering, delaying and defrauding Pemberton's creditors.

Carr's answer admitted that the revived judgment had been entered as alleged, that execution delivered to the sheriff, had been returned nulla bona, that there was still due on that judgment the sum of \$13,580.21, together with interest, but he denied the existence of the partnership on August 26, 1946, when the revived judgment was entered, denied that he was indebted to Pemberton, or that he was a party to any fraudulent transfer of Pemberton's property.

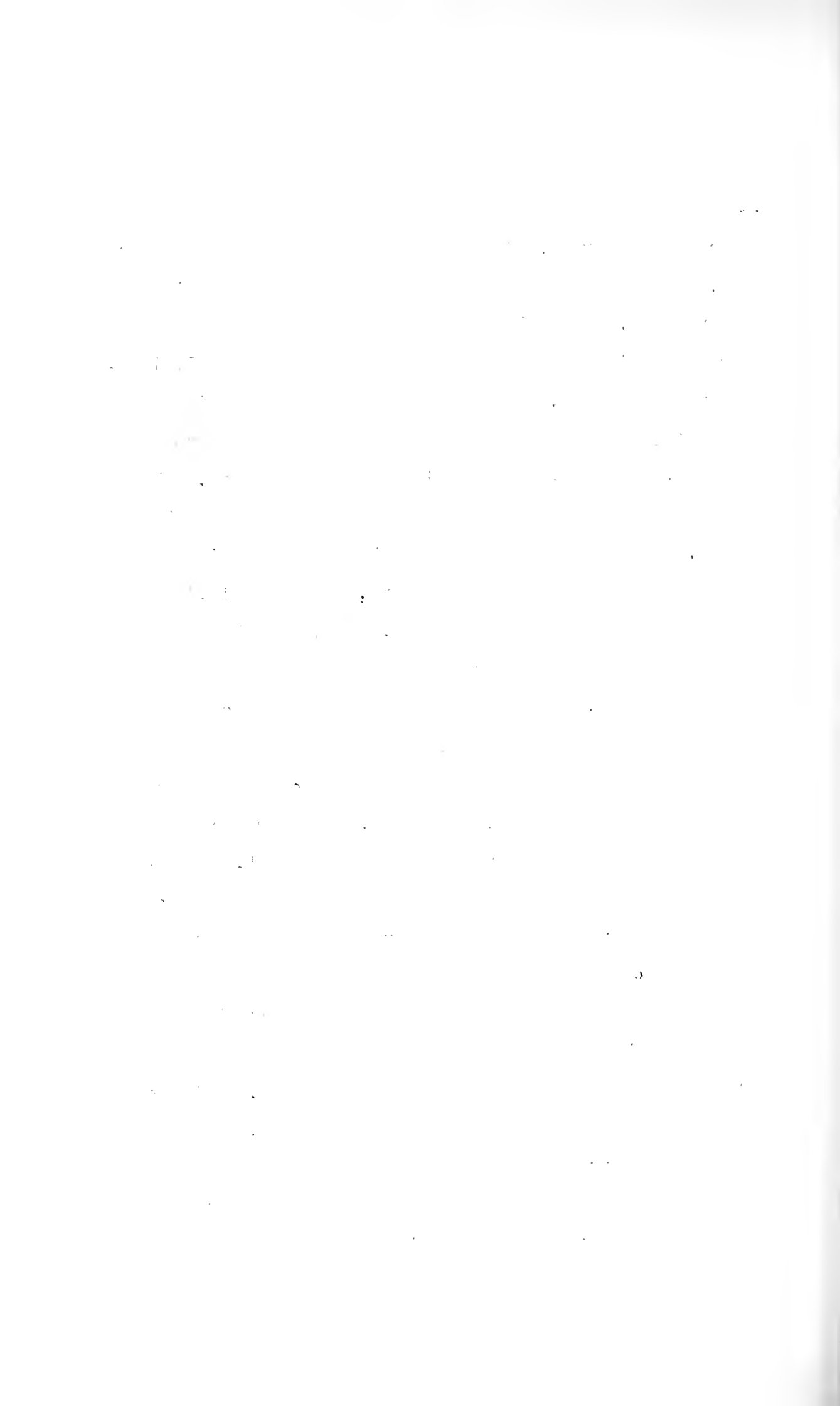
Both of the Pembertons were defaulted for want of an answer, and their whereabouts were unknown at the time of the trial. Since the facts relating to the transfer of Pemberton's interest were presumed to be peculiarly in Carr's possession, plaintiffs sought to prove their case largely through his testimony, and accordingly he was called as an adverse witness, and later also testified on his own behalf. He stated that about July 1,

1945 he entered into a partnership agreement with Pemberton under the name of Calumet Utilities Sales and Service. Their place of business was located at 7604 Cottage Grove avenue in Chicago. Both Pemberton and Carr had been engaged in similar businesses for many years, and they consolidated their interests in the copartnership formed, as stated, on July 1, 1945. Shortly thereafter Pemberton became ill and had to have major surgery at South Shore Hospital. Following his operation he came to the store only for a short period of time each day, "he was not able to do anything," because of his physical condition "was of no value to me." Subsequently, in December 1945, he submitted to surgery for the second time; "he was unable to do anything but be driven to the store and sit around the store; he was a very sick man as far as his ability to do me any good was concerned; I had to do all the work." About July 1, 1946 he told Carr: "'I can't carry on any further this way. I am going to have to have a third operation.' * * * He asked if I would be interested in buying him out. I was pretty well fed up on the whole deal at that time. I acquiesced. I was very willing to have an opportunity to buy him out. He said, 'Now, I can't conduct my affairs. I am going into this operation. I expect to go in around August 1. I have got to have Mrs. Pemberton take care of my affairs. I want to appoint her as my partner in my stead. Do you have any objections to that?' I said, 'No, as long as we are going to dissolve on the first of August.' That



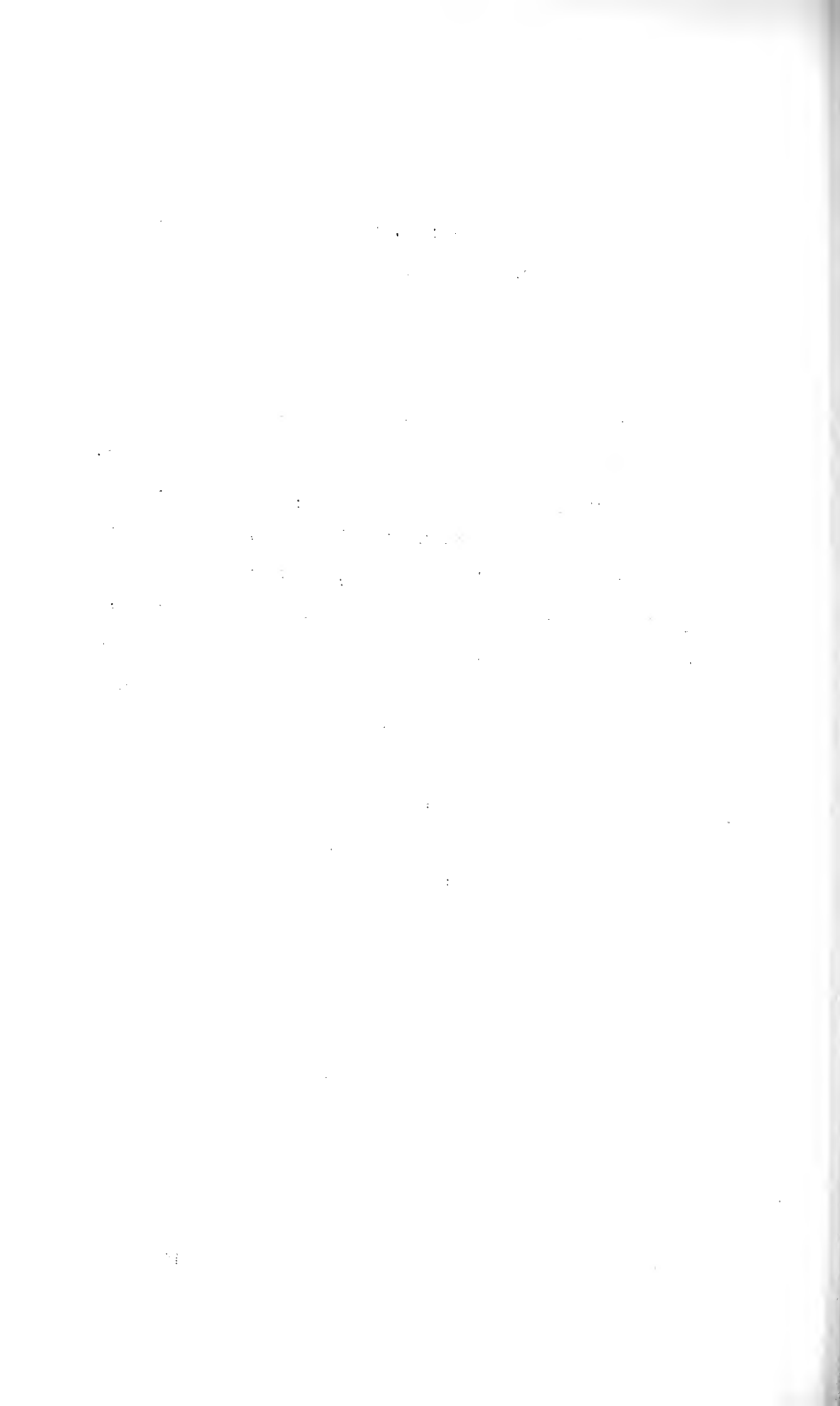
was our fiscal year. 'I don't know how I could object to that. I would rather deal with her, if it was a matter of you dying. I think it would be less complicated than it would be if we just let it ride.' * * * July 1, 1946, we could not agree. He asked me how much the business was worth, and I told him I could not tell and I would not know, honestly, * * * until we have our audit. The fiscal year was * * * August 1, 1945 to * * * July 31 [1946]. * * * So it was agreed that we would hire Raymond Blunt to conduct this audit, which we did." The audit was completed August 22, 1946. In the meantime Pemberton had gone to Augustana Hospital for a third operation, which took place late in July or early in August of that year.

On September 10 Carr gave his personal check for \$1000.00, payable to Mrs. Pemberton, on account of his purchase of the Pemberton partnership interest, and received a bill of sale. The balance of \$5000.00 was to be paid as soon as Carr could acquire the necessary funds, and on September 12 he paid this balance by check to Mrs. Pemberton at the Pemberton home and in the presence of her husband. A set of extra keys to the store which had been in the possession of Mrs. Pemberton was turned over to Carr at the time the \$5000.00 check was paid. It further appears from Carr's testimony that he was utterly unaware of the fact that a judgment had been entered against Pemberton in 1929 and revived by scire facias in August 1946. He stated that "no



creditors of Mr. Pemberton ever called at the store and made themselves known to me. I did not receive any knowledge either directly or indirectly during any of the times concerned that would show Mr. Pemberton was indebted to anyone."

The controlling question at issue was whether Carr's purchase of the partnership interest was fraudulent and void, as plaintiffs contend, and made for the purpose and with the intent of hindering, delaying and defrauding Pemberton's creditors, or whether he was a bona fide purchaser who acquired half of the partnership business for a valuable consideration without notice of plaintiffs' judgment. The chancellor found the sale to be a bona fide transaction, free, so far as Carr was concerned, of any fraud or knowledge of any questionable motive on the Pemberton's' part, and for a good and valuable consideration. Inasmuch as plaintiffs' case rested largely on Carr's testimony, the chancellor necessarily predicated his findings upon Carr's good faith, his demeanor on the stand and the credibility of his statements, and the findings of the chancellor under the circumstances must be accorded great weight and should not be set aside unless plainly and palpably erroneous. Hall v. Pittenger, 365 Ill. 135. As we read the record, the chancellor was justified in concluding that Carr had no knowledge whatever of the judgment entered against Pemberton and had no reason to believe that Pemberton had any unpaid creditors or

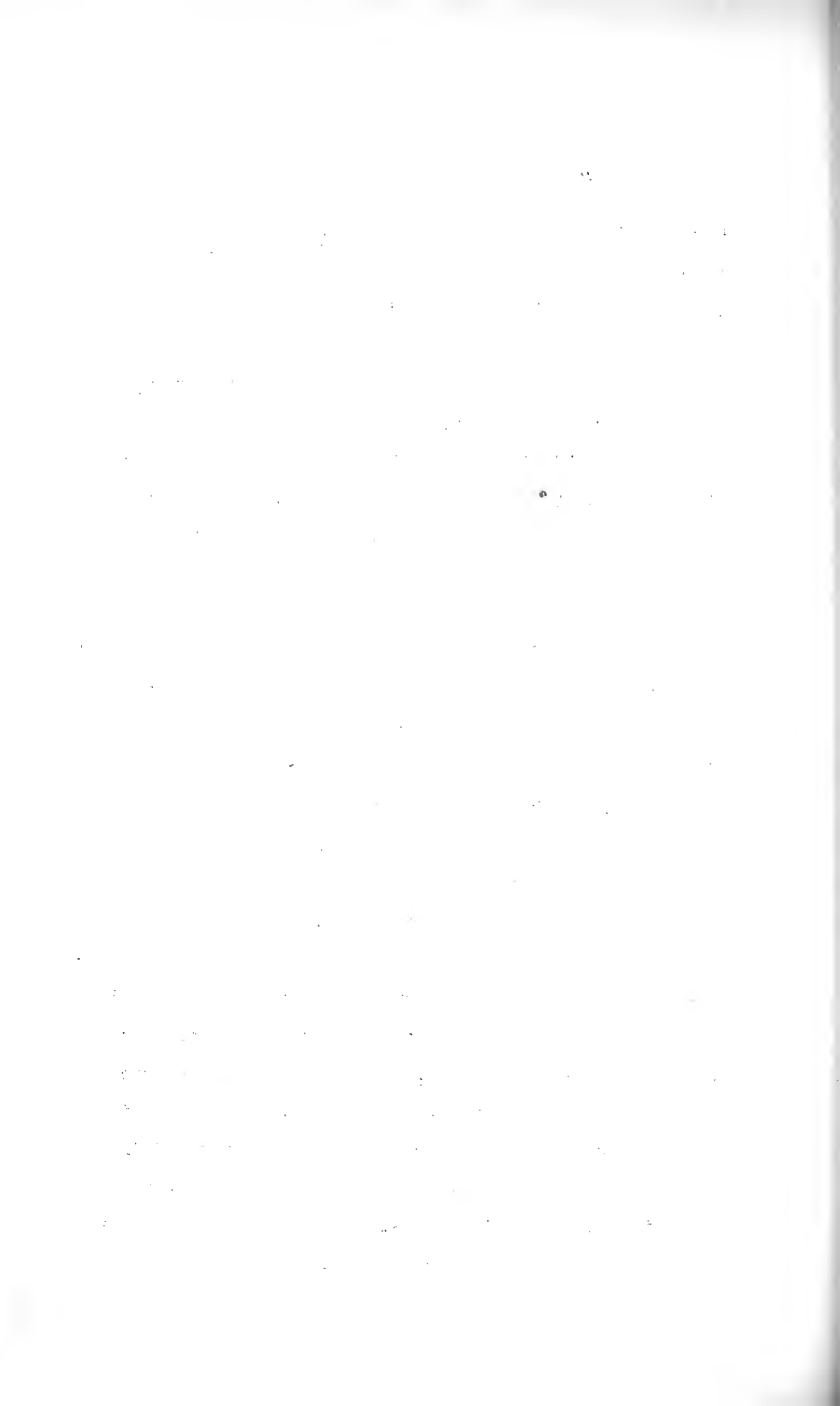


debts, either old or new. Carr's reasons for acquiring Pemberton's interest in the business were plausible and worthy of belief.

Plaintiffs urge in their brief, and contended on oral argument, that inasmuch as Carr did not plead the affirmative defense that he was a bona fide purchaser, the decree, based upon a defense not pleaded, is erroneous. Under the pleadings it was incumbent upon plaintiffs to prove fraud as charged, and a denial of fraud by defendant in his answer was sufficient; the defense of bona fide purchase was not an affirmative defense, and defendant was not required to set it up as such. Moreover, plaintiffs expressly acquiesced in the chancellor's view that Carr's good faith was the principal issue in the case. At one point in the proceeding the court said: "I will sustain the objection on the question of whether or not there was a bona fide purchase by this man [Carr]. That is the question that we have here. * * *" To this, plaintiffs' counsel replied, "All right." In First Mission Church v. Rockford Broadcasters, Inc., 324 Ill. App. 8, it was also claimed that defendant was barred from asserting any defense that was not alleged in its answer, and as pointed out by the court in its opinion: "When the chancellor brought these points to the attention of appellant's [plaintiff's] counsel * * * indicating their determinative character, appellant did not claim that they were not cognizable under appellee's [defendant's] answer, which if it had been done, would

have enabled appellee to ask for and obtain leave to amend its answer so as to include such points. Instead, it elected to file briefs on the points, and treated them as properly at issue. It cannot now, after thus lulling appellee into a failure to amend its answer, take any advantage of it."

Plaintiffs' counsel argues that the purchase of the Pemberton interest was made after the revived judgment was entered, and he stresses the fact that the evidence is not clear as to the precise date on which the transfer was accomplished. He contends that two different dates appear in the record, and that Pemberton's affidavit, given at the time the initial payment of \$1000.00 was made, contradicts Carr's testimony as to when the transfer occurred. Carr had no attorney in the transaction and kept no memoranda of exact dates and places, but testified solely from his recollection. In the main there is no serious discrepancy between his testimony and the documentary proof. His testimony that he acquired the Pemberton half interest in the copartnership at a time when Pemberton seemed to be seriously ill and had to submit to three operations in the course of a comparatively short time, and because of his physical condition could not give the business further attention, is amply supported by the record. The parties had in effect agreed on the sale before the revived judgment was entered. There is no basis for the contention that Carr was a party to any fraud or that he bought the



Pemberton interest in the partnership for the purpose of hindering, delaying or defrauding plaintiffs or other creditors. Since Carr had no notice or knowledge of Pemberton's debts, a fact which stands undisputed of record, the chancellor could not fairly have found that he connived with Pemberton to take over the one-half partnership interest for a fraudulent purpose. The audit showed that the business as of July 1946 was valued at approximately \$25,000.00. Carr gave Mrs. Pemberton \$6000.00 for her equal share. She and her husband evidently considered that as an adequate purchase price, in view of the circumstances. Carr, who paid over \$6000.00 cash, not knowing that Pemberton was indebted to others, should not be charged with any fraudulent motive that Pemberton might have had and of which Carr was utterly unaware, and even though Pemberton's transfer of his partnership interest to Mrs. Pemberton may have been fraudulent, so far as Carr was concerned, the chancellor was justified in finding that the transaction was bona fide and for a valuable consideration. Upon the record it stands undisputed that Carr was not indebted to Pemberton; he was not Pemberton's partner at the time the transaction was completed, Pemberton having previously assigned his interest to Mrs. Pemberton; Carr acted in good faith and acquired an equal share in the partnership at a price which he (Carr) considered fair and which the Pembertons were willing to accept. Plaintiffs fail to prove the charges of fraud alleged in their

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complaint, and we think the decree was proper; it is therefore affirmed.

Decree affirmed.

Scanlan and Sullivan, JF., concur.



44634

SUPERIOR HOUSEHOLD MANUFACTURING)
CO., an Illinois corporation,)
Appellee,)

APPEAL FROM MUNICIPAL

v.)

COURT OF CHICAGO.)

BASIL BRUNE (BASEL H. BRUNE),)
Appellant.)

339 T.A. 253

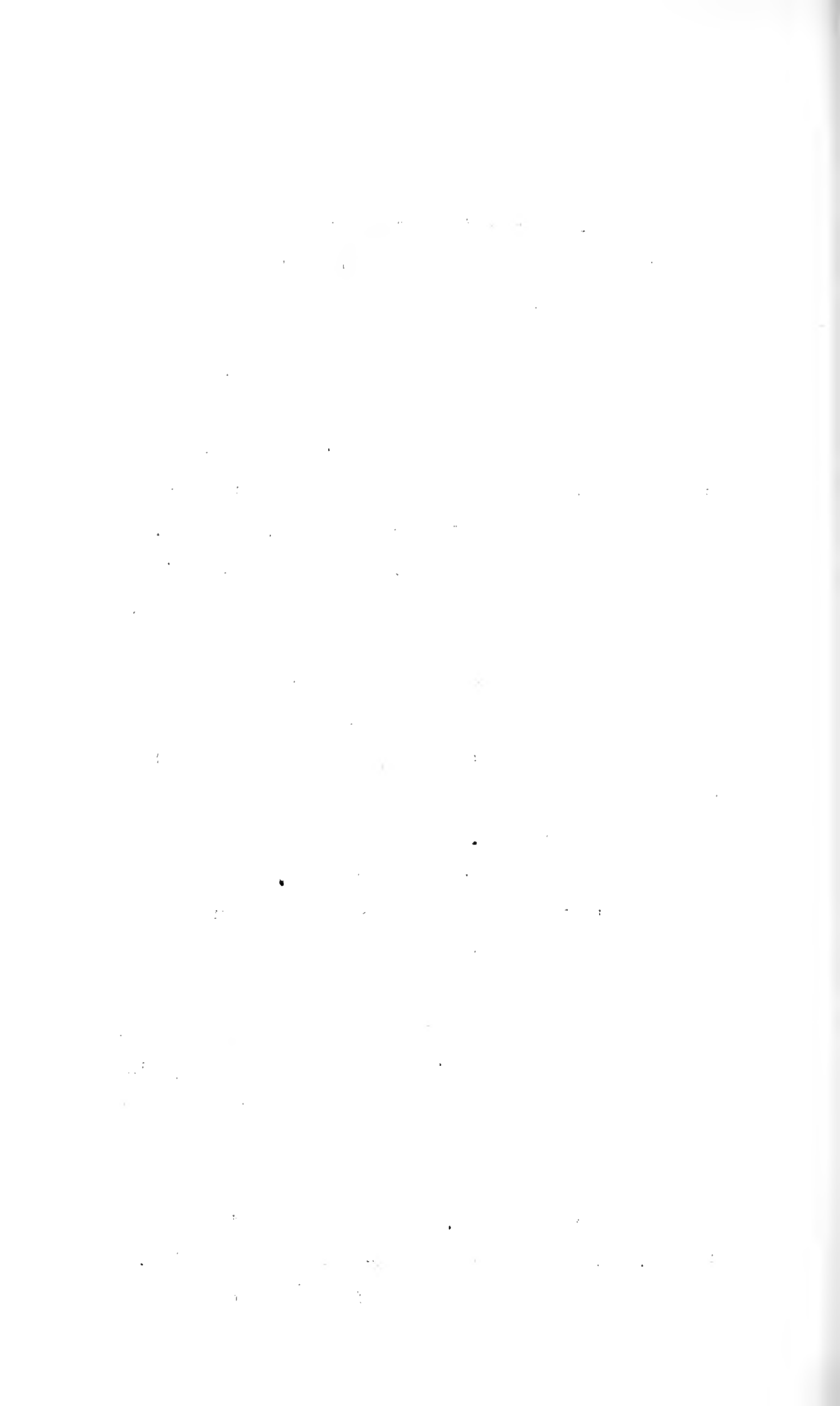
MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Plaintiff brought an action in trover to recover \$400.00, the agreed value of 10,000 rubber dog bones allegedly converted by defendant when, as president of Harvey Rubber Company, he instructed its employees not to give possession of the dog bones to plaintiff, which had paid for them and claimed title thereto. The case was tried upon a stipulation of facts and an agreement between the parties that defendant, without pleading, might rely on any defense which the stipulated facts supported, and that the case should be disposed of upon a motion of each party for judgment upon the statement of claim and stipulation, without the introduction of any evidence. Pursuant to hearing, the court entered judgment in favor of plaintiff in the sum of \$400.00 and costs, from which defendant appeals.

From the stipulated facts it appears that on December 18, 1947 plaintiff agreed to advance money to the Harvey Rubber Company to complete the manufacture of rubber products then in process. The rubber dog bones ordered were to be priced at the agreed value of \$40.00 per thousand. Harvey Rubber Company agreed to deliver at plaintiff's place of business the quantities of dog

bones and other merchandise which plaintiff should later order, and the \$400.00 advance which plaintiff made within the next few days was to be credited against the cost of the shipment. On December 22, 1947 plaintiff ordered 10,000 rubber dog bones to be delivered at its place of business. The bones were packed in the plant of the Harvey Rubber Company, and the containers were marked with plaintiff's name and address and set aside for delivery to plaintiff's place of business. However, before they could be delivered, the defendant, Basil Brunc, who was president of the Harvey Rubber Company, issued instructions to employees at the plant to refuse to deliver the 10,000 rubber dog bones to plaintiff. The reason first given for the non-delivery was the break-down of defendant's truck. Within a month after delivery should have been made, the Harvey Rubber Company became bankrupt. Defendant was evidently aware of the financial position of his company, and he refused to make physical delivery of the merchandise on the additional ground that to do so would constitute an illegal preference to plaintiff; but this reason was subsequently abandoned and is not urged in this appeal.

It is now defendant's sole contention that, since the contract between plaintiff and Harvey Rubber Company required the latter to deliver the goods at plaintiff's place of business and such delivery was not made, title never vested in plaintiff. Rule 5 of the Uniform Sales Act (par. 19, sec. 19, chap. 121-1/2, Ill. Rev. Stat. 1947) is principally relied upon in support of defend-



ant's position. It provides as follows: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." The provision of the foregoing rule of the statute which requires the seller to deliver the goods to the buyer is one that may be waived by the party for whose benefit it is imposed, and under the circumstances the seller in this case cannot complain because he is not required to meet the condition, i.e., delivery.

The underlying question is whether title to the bones had passed to plaintiff from the seller on December 22, 1947, when the merchandise was ready for delivery at the plant. Authorities relied upon by defendant are not applicable to the circumstances of this case. In several of the cases cited the court held that the mere payment of a purchase price was not controlling to pass title against creditors of the seller. Plaintiff does not contend that solely because payment for the merchandise had been made, title passed to it from the seller; it relies on the whole chain of circumstances. The merchandise having been paid for, ascertained, set aside, packed and marked as plaintiff's property, title passed and plaintiff was entitled to possession thereof as its owner. (Rule 4, par. 19, sec. 19, chap. 121-1/2, Ill. Rev. Stat. 1947.) Delivery to plaintiff's place of business was not essential to the passage of title because plaintiff

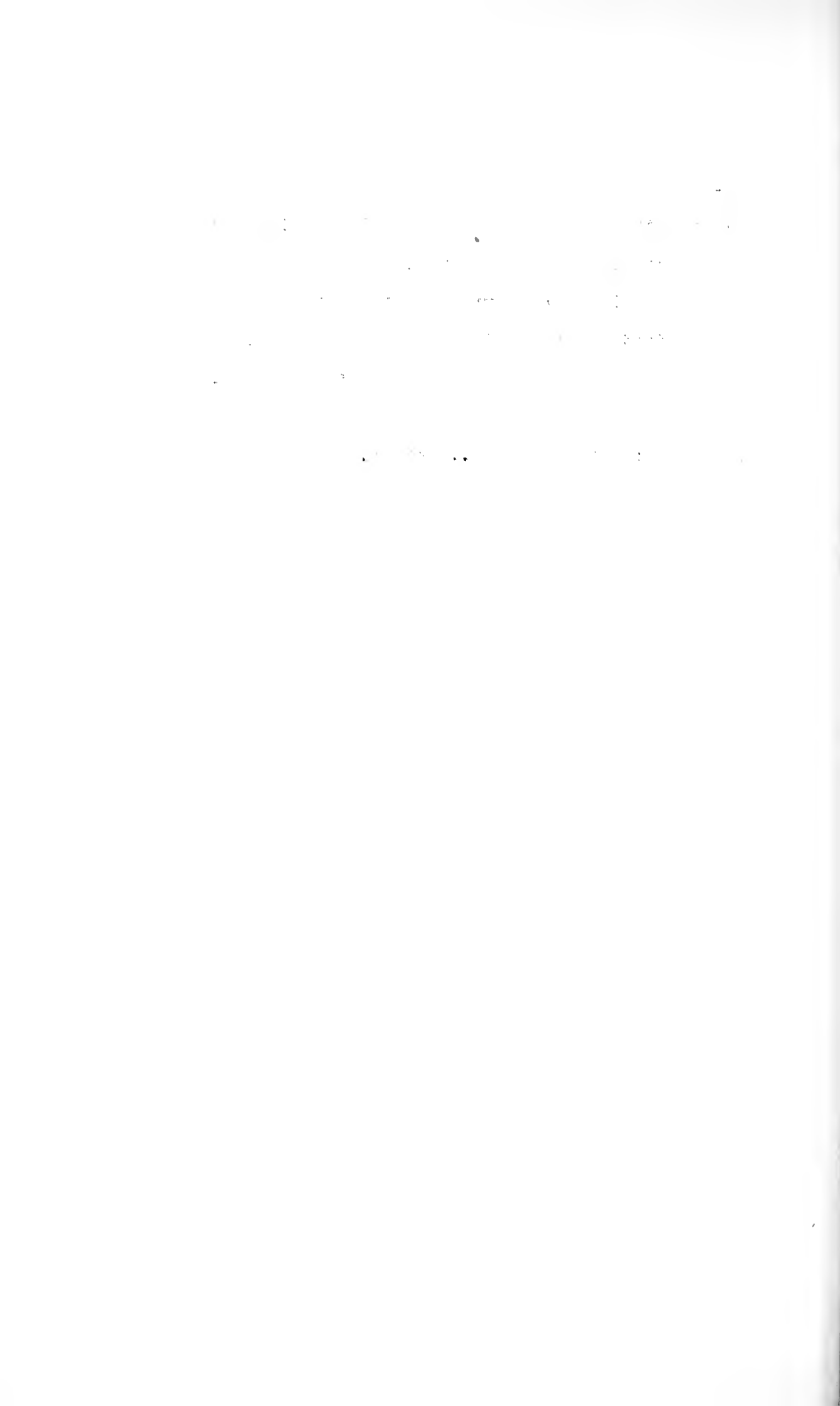
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did not insist upon delivery and had a right to waive that provision of the statute.

We think the court properly entered judgment for plaintiff, and it is therefore affirmed.

Judgment affirmed.

Scanlan and Sullivan, JJ., concur.



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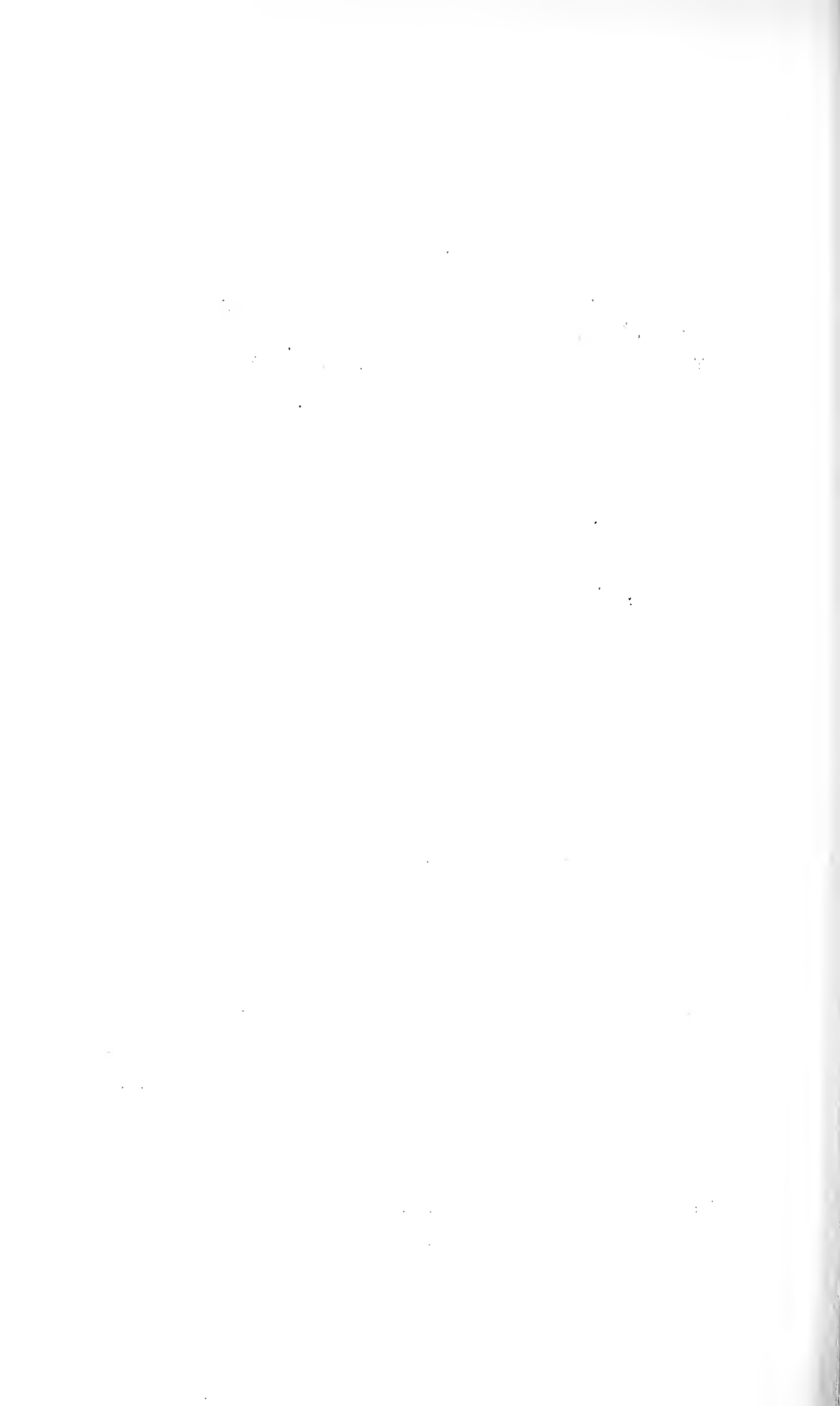
EVA M. ELLIOTT, Administrator of the
Estate of Myrtle U. Duncan, Deceased,
Appellee,
v.
CITY OF CHICAGO, a Municipal Corporation,
and THE PENNSYLVANIA RAILROAD COMPANY, a
corporation,
Appellants.

)
)
) APPEAL FROM
)
) SUPERIOR COURT,
)
) COOK COUNTY.
)
)

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Eva M. Elliott, administrator of the estate of Myrtle U. Duncan, deceased, brought suit against the City of Chicago, the Pennsylvania Railroad Company and Joseph Riha to recover damages for the wrongful death of the deceased on September 29, 1945 at about 4:30 a.m. while she was riding in an automobile as Riha's guest, traveling in a northerly direction on Cottage Grove avenue at a place where the Pennsylvania railroad right-of-way passes over Cottage Grove avenue. Plaintiff settled with Riha for \$1500.00, gave him a covenant not to sue, and discharged him from the case. Trial by jury as to the remaining defendants resulted in a verdict for plaintiff against the city and the railroad company in the sum of \$8500.00. The court overruled defendants' motions for judgment notwithstanding the verdict, for a new trial and in arrest of judgment and entered judgment on the verdict, from which both defendants appeal.

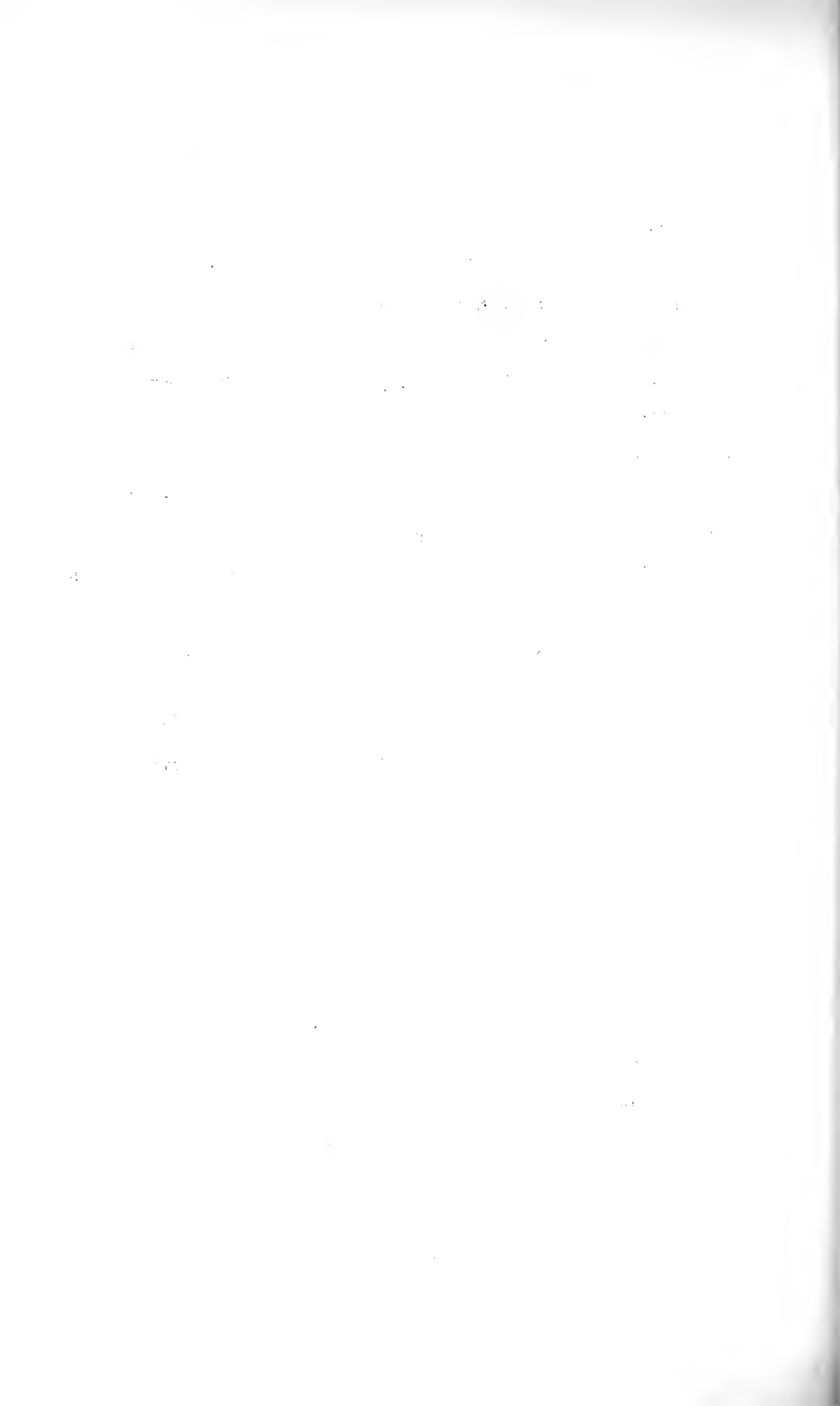
The salient facts disclose that about eight-thirty of the evening of September 28, Riha and Mrs. Duncan attended the Woods Theater in the downtown district of



Chicago, and about midnight drove to a restaurant on Indianapolis boulevard in Roby, Indiana. It was between two and two-thirty when they finished dinner, and Riha proceeded to drive Mrs. Duncan in his 1940 Chrysler sedan to her home, 6646 Yale avenue, in Chicago. Mrs. Duncan was sitting in the front seat of the car to the right of the driver.

Riha testified that it rained at intervals on their way home; that when approaching the viaduct his headlights were lighted; that with no light except his own road lights he could see 150 feet ahead, sometimes more and at times a little less; that he was driving 25 miles an hour before the impact; that his brakes were in good condition; and that he could stop within 15 to 20 feet on dry pavement. He stated that as he was about to pass under the viaduct, the left side of his car struck the pillar; that he saw the pillar when he was almost on top of it, and tried to swerve away. He further testified that the city lights, as well as the lights to the right and left under the viaduct and over the sidewalk along the underpass, were lighted.

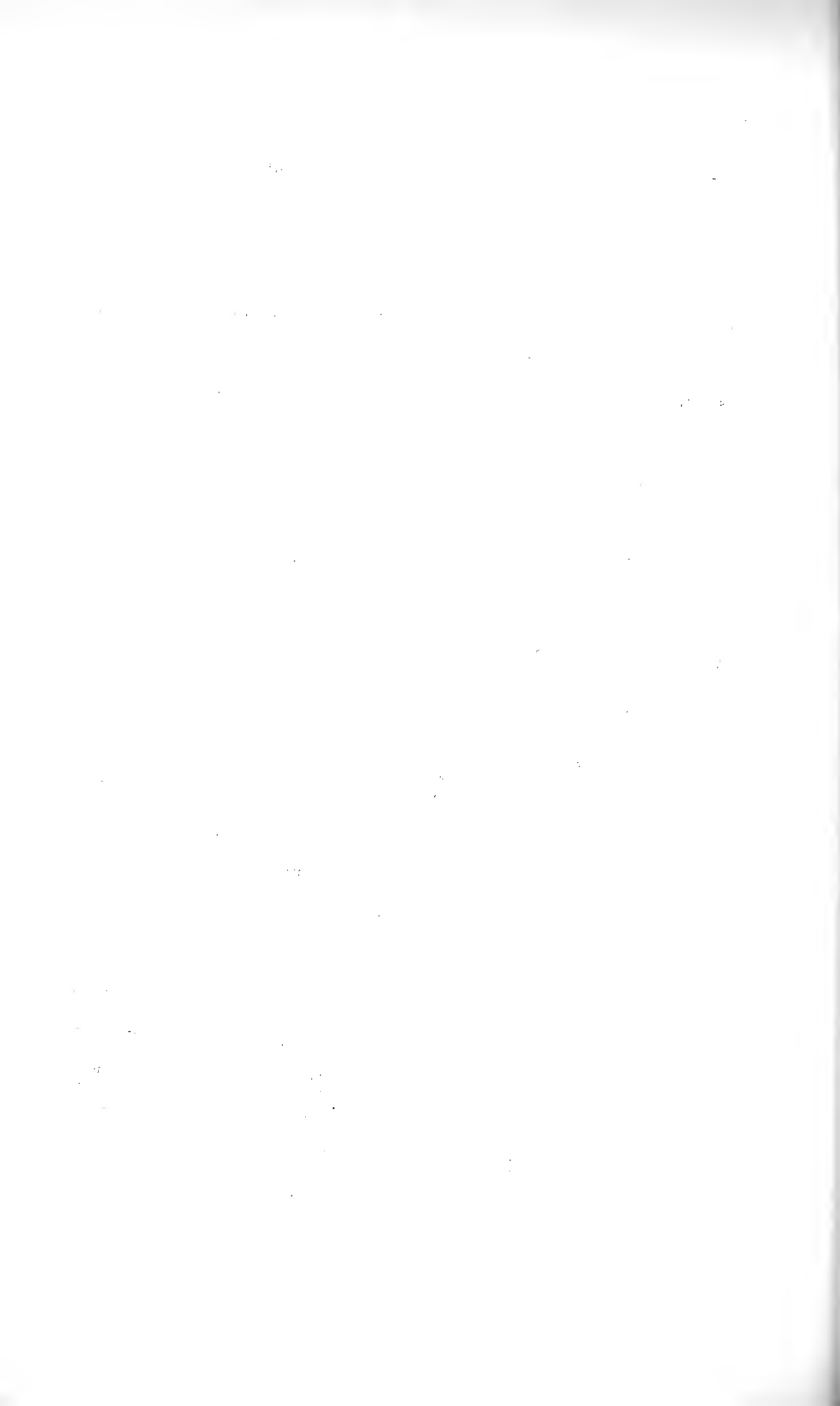
Cottage Grove avenue, at the place of the accident, is about 45 feet wide and has a double-track street-car line running parallel with the sidewalk and curb under the railroad viaduct. Steel piers support the bridge or trestle over which the railroad right-of-way is operated, thus providing two separate lanes for north and south traffic. There is more than sufficient room in each lane



for a street car and an automobile to pass under the viaduct simultaneously; nevertheless, Riha drove farther over than the extreme left of his own right lane, passing over the street-car track in doing so, and hit the pillar.

Upon arrival of the Accident Prevention Division at the scene of the accident, they found Riha's car jammed against the south center pillar of the viaduct, facing in a northwesterly direction. The left front corner of the car was damaged. Mrs. Duncan was lying in the front seat, fatally injured. Riha sustained a broken jaw and minor leg wounds.

With respect to the Pennsylvania Railroad Company, the complaint charged: "(5) That it became and was the duty of the defendant, The Pennsylvania Railroad Company, a corporation, to maintain its said trestle, support or bridge and the piers, posts or pillars used to uphold and support the same in a safe condition so as not to endanger the public using said Cottage Grove Avenue." In its answer the railroad company admitted the allegations of paragraph 5, "except it says that it was bound only to use ordinary care in the maintenance of its trestle, piers and posts." More specifically, the charge against the railroad company was that it maintained the center piers, more particularly the south center pier of the viaduct, without a light on it; that is, "in an unlighted condition and without any warning sign, distinctive markings or any other evidence of their presence in said Cottage Grove Avenue in the night time." Substantially the same charge was made



against the City of Chicago. In City of Chicago v. Pennsylvania Co., 252 Ill. 185, and again in People v. Illinois Central Railroad Co., 235 Ill. 374, it was held that a railroad company is required to maintain its structures supporting the tracks elevated above the street level in such condition as to render it safe for persons and property passing underneath them, but that its duty ended after it had elevated its tracks and restored the street and sidewalk to proper condition. These decisions, and others cited in the briefs of the railroad company, enunciate the rule that where tracks have been elevated and the street and sidewalks underneath restored to proper condition, there is no obligation on the part of the railroad to light the underpass; its duty is simply to protect persons and property by maintaining its trestle, support or bridge, or the piers, posts or pillars used to support the same, in a safe condition. Under the circumstances we are of the opinion that plaintiff made no case of negligence against the railroad company, and that the railroad defendant's motion for judgment notwithstanding the verdict should have been allowed.

With respect to the liability of the city, it is contended by that defendant that Riha's negligence was the proximate cause of the accident and the resultant death of Mrs. Duncan; and also that plaintiff failed to properly sustain the charge in the complaint that the accident was due to the insufficient lighting of the

underpass or lack of "distinctive markings which would act as a warning or signal to persons traveling upon and along said highway." Riha, who had been charged in the complaint with wilful and wanton conduct, testified that in approaching the viaduct he could see 150 feet ahead with no light except his own, and that the city lights were lighted and burning on the right and left sides under the viaduct. While we find some difficulty in escaping the conclusion that the accident was due solely to Riha's gross negligence, it is unnecessary for us to so hold, because in our opinion the verdict of the jury, predicated upon the claim of plaintiff that the insufficient lighting was a proximate cause of the accident, is against the manifest weight of the evidence.

Accordingly, the judgment against the Pennsylvania Railroad Company is reversed, and judgment against the City of Chicago is reversed and the cause is remanded for a new trial as to that defendant.

Judgment against defendant Pennsylvania Railroad Company reversed; judgment against defendant City of Chicago reversed and cause remanded for a new trial.

Sullivan and Scanlan, JJ., concur.

44548

JULIUS B. RICHMOND, as Administra-
tor of the Estate of Jacob Richmond,
Deceased,

Appellant,

v.

EMMA STAMM, CECIL EMERY, JOSEPH
WILT, JAMES COLLINS and GERTRUDE
MORITZ, members of a protective
committee under a deposit agree-
ment dated July 27, 1932, con-
cerning the Schwartz Building;
EVANSTON TRUST AND SAVINGS BANK,
Depository, and FIRST NATIONAL
BANK OF CHICAGO, as Successor
Trustee under Trust Deed recorded
as Document No. 9491098,

Appellees.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

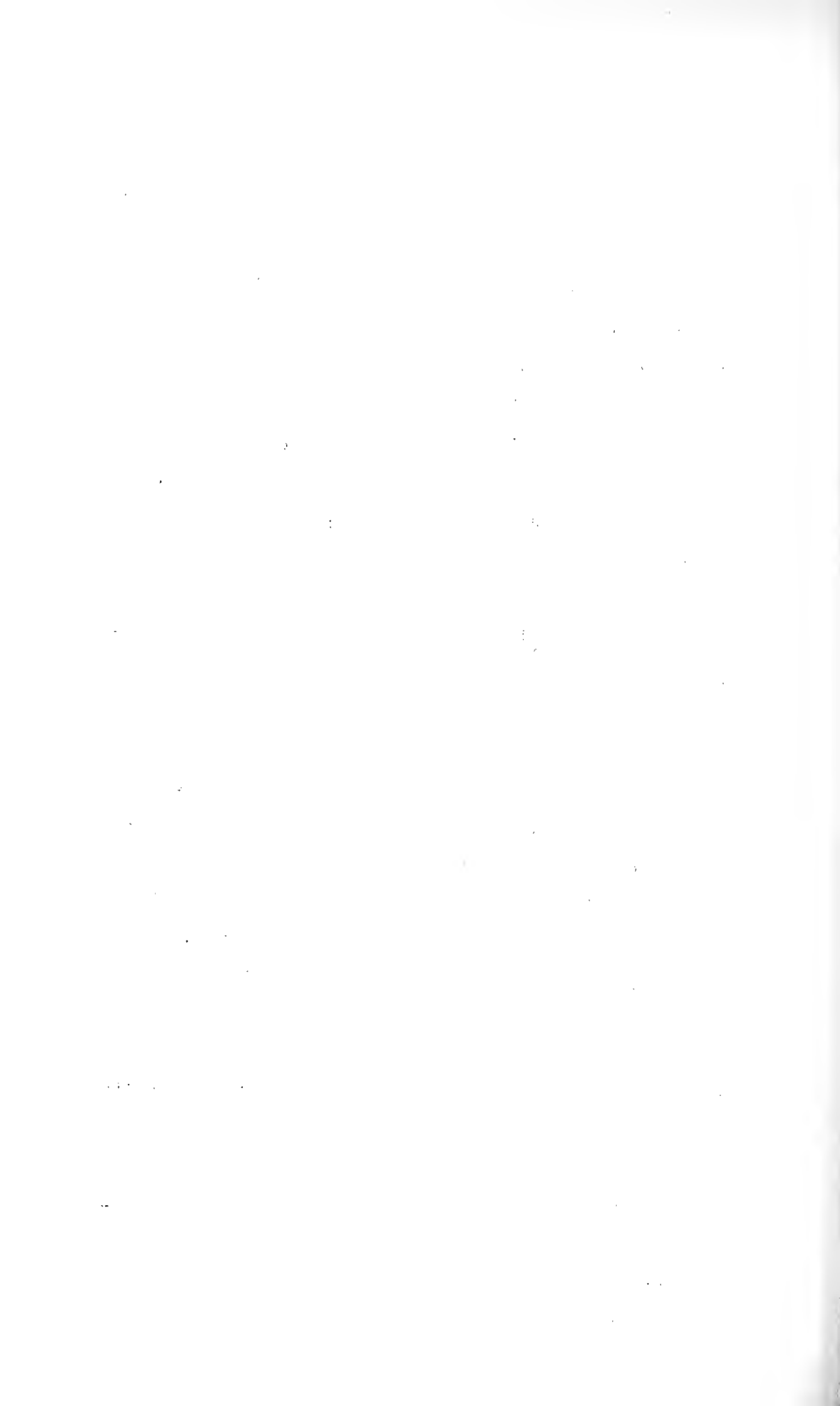
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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE
COURT.

From a decretal order dismissing his complaint for
want of equity plaintiff appeals.

The complaint consists of two counts. The first
alleges: (1) the execution of a \$90,000 bond issue on
December 1, 1926, maturing December 1, 1933, bearing
interest at 6-1/2% until maturity and 7% after maturity;
(2) the execution of a Trust Deed securing the bonds as
a first lien on the premises commonly known as 4745-47
N. Damen avenue; (3) the execution of a Junior Trust
Deed securing a note issue of \$17,500; (4) the substi-
tution of the First National Bank of Chicago as successor
trustee under the first mortgage Trust Deed; (5) the
deposit of the bond by the decedent with the Evanston
Trust & Savings Bank as depository for the Protective
Committee, which consists of defendants Emma Stamm,
Cecil Emery, Joseph Wilt, James Collins and Gertrude
Moritz; (6) the appointment of plaintiff as the

Administrator of his estate on July 10, 1947; (7) the agreement of the Protective Committee to perform faithfully its duties to acquire the property for the depositors by foreclosure or reorganization; that no foreclosure proceedings were ever filed, and no reorganization was ever effected; that Cecil Emery, one of the members of the Committee, acquired title to the premises in his individual name and without filing any declaration of trust, and the Committee grossly neglected to protect the interest of the depositors and breached its trust by failure to foreclose the property and acquire it for the depositing bondholders or the adoption of a reorganization plan; and (8) that because of such breach of trust the Committee should be removed and the court should appoint a trustee or receiver to take charge and possession of the property to the end that a reorganization plan be worked out under the jurisdiction and control of the court, and the complaint prays for certain relief. The second count adopts the allegations in paragraphs (1) to (8) and alleges further: (9) that the premises consist of twelve flats and one store and are insufficient security to satisfy the first mortgage debt; (10) that the lien given to the first mortgagee is superior to any other lien; (11) that due to the fact that no action to foreclose was ever commenced and the entire bond issue may be outlawed, plaintiff brings this action to foreclose the bond issue for the common use and benefit of all bondholders, and it prays for a foreclosure of the



property as is usual and customary in such foreclosure. Cecil Emery, Evanston Trust and Savings Bank and First National Bank of Chicago filed answers.

Plaintiff's theory is that "the Committee which was created in 1930 for the purpose of protecting the interest of the depositors was charged with the duty of either acquiring the property for the depositors without a foreclosure, or to foreclose the lien of the Trust Deed so that the Committee could either sell the property or reorganize it; that it was grossly negligent and committed a breach of trust when it remained dormant for eighteen years without even taking the first step towards a reorganization; that it also breached its trust when it invested \$1,500, derived from the income of the property, in the acquisition of the interest of the mortgagor in the name of Cecil Emery without acquiring the \$17,500 junior mortgage and without the execution of a declaration of trust; and that the fees which it received for itself and for its agencies were unwarranted because of its breach of trust; that the court should have granted the relief to direct Emery to file an account, and if the junior lien were released since the filing of the complaint as asserted by Cecil Emery and if the interest of the non-depositors could have been acquired as stated by him, the court should have ordered a sale of the property under a reorganization plan to be approved by it, and not permit the Committee to remain in control of the property for an additional twenty-year term or to sell the property at a private

sale subject to dissents which might be filed under the deposit agreement, and that the decree which dismissed the complaint for want of equity cannot be sustained on any theory."

Defendants' theory is that "the burden of proof was upon plaintiff to sustain the allegations of his complaint, and that he has failed to prove his case by a preponderance of the evidence. Defendants contend that the plaintiff wholly failed to introduce any proof of gross negligence or of a breach of trust, as was alleged in complaint. It is the theory of defendants that, because there was no showing made by plaintiff of fraud or bad faith on the part of the Committee or the trustee (Cecil Emery), the Court could not substitute its discretion for the discretion of the Committee. Defendants contend that the Committee was vested with discretionary duties and powers, and that the Court could not interfere with the discretion of the Committee concerning said matters in the absence of fraud or bad faith and that the court could not remove the committee unless they were acting in a wholly unreasonable and arbitrary manner. It is the further contention of these defendants that the plaintiff is bound by the written terms of a deposit agreement by and between the Committee and plaintiff's intestate who entered into said agreement with the other participating bondholders."

The chancellor dismissed the complaint for want of equity because, as he stated, he could find no wrong done by the Committee. In our view of this appeal the

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action of the chancellor was fully warranted by the salient facts in the case, which are not disputed. On July 27, 1932, Jacob Richmond (plaintiff's intestate) and other bondholders entered into a Deposit Agreement for the protection of the holders of the First Mortgage Bonds on the Schwartz Building, located at 4745-47 N. Damen avenue, Chicago, Illinois, with Emma Stamm, Cecil Emery, Joseph Wilt, James Collins and Gertrude Moritz, who composed a Bondholders' Committee. The total bond issue secured by the mortgage was \$90,000, evidenced by 275 bonds. Jacob Richmond was the holder of one \$500 bond. He died on July 10, 1947, and plaintiff, Julius B. Richmond, was appointed administrator of his estate, and as such administrator he filed the instant complaint, on September 11, 1947. In 1932 the Committee, under the Deposit Agreement, entered into possession of the premises, managed the property, and collected the rents. On March 26, 1934, title to the premises was purchased by the Committee for \$1,500 and title was taken in the name of Cecil Emery, a member of the Committee, as trustee, and Emery executed a written declaration of trust which was to expire in twenty years. Since the Committee took possession of the property they have managed it, paid all taxes and expenses of every kind, and have paid every year to the bondholders a dividend of three per cent, and up to the date of the hearing they have paid in dividends a sum equal to more than forty-five per cent of the face value of the bonds. Commencing in 1936 the Committee made a report in writing each year to the bondholders, in which the total receipts

and expenditures were shown; also the dividend payments. In the Committee's first report they advised the bondholders of the "Plan of Committee," a part of which plan was to avoid a foreclosure of the property. No request for an accounting was ever made by any bondholder nor did any bondholder ever ask the Committee to place the property on the market to be sold. Indeed, no protest nor demand of any kind was ever made to the Committee by any bondholder. The Committee notified the bondholders that they were unable to find a buyer willing to pay an adequate price for the property and that they planned to continue the operation of the building until the market for real estate improved sufficiently to make it possible for the Committee to liquidate the property on a basis satisfactory to the bondholders. No objection to the said plan was ever made by any bondholder. From what we have stated it appears that plaintiff's intestate, Jacob Richmond, never made any complaint or request of the Committee. In fact, the record fails to show that plaintiff ever made any complaint or demand on the Committee before he filed the suit. Plaintiff did not testify in the hearing, and his indefatigable counsel did not see fit to call upon any bondholder to testify in support of the complaint. At the time of the hearing the total bond issue outstanding was \$81,000, \$72,000 of which was deposited with the Committee and the balance of the outstanding bonds save \$600 in amount were in the hands of parties who would cooperate with the Committee. The trust under which Emery holds title to the real

estate for the Committee expires in 1954. The junior lien which had been a cloud upon the title had also been removed and the judgment against the original mortgagors, which had been a lien against the property, had been satisfied. The position of the Committee was that if, during the depression, they had instituted foreclosure proceedings to foreclose the lien of the trust deed given to secure the bonds of the bondholders there would have been danger that but a fraction of the original investment would have been returned to the bondholders. We take judicial notice of the fact that during the great depression the value of real estate greatly depreciated and that a foreclosure sale of property seldom, if ever, brought a figure commensurate with the normal value of the property.

The chancellor had before him the written agreement of July 27, 1932 (the Deposit Agreement), entered into between the Committee and the bondholders, including plaintiff's intestate. Under this agreement the Committee were given broad discretionary powers; they had full power and authority to manage and control the property and to sell the same at such price as they might deem for the best interests and protection of the depositors; and the agreement authorized the Committee to purchase the property and to place the title to the same in a trustee. Plaintiff, in his brief, treats the Committee as trustees under the Deposit Agreement of July 27, 1932. "If a trustee is vested with the power to exercise discretion, as in the present case, chancery will not interfere so long as

he is acting bona fide, and not in any wholly unreasonable and arbitrary manner. (3 Bogert on Trusts and Trustees, sec. 560; 26 R. C. L., Trusts, sec. 234.)" (Chicago T. and Tr. Co. v. Chief Wash Co., 368 Ill. 146, 155.) The burden of proving the allegation of his complaint that the Committee breached the trust was upon plaintiff, and the chancellor, in our judgment, properly held that he failed in that regard.

When the length of the great depression is remembered the showing made by the Committee is a surprisingly good one. The fact that not a single bondholder, during the years that the Committee have acted under the Deposit Agreement, has ever complained of the conduct of the Committee, is significant indeed. It remained for an administrator of the estate of one of the bondholders, who owned a \$500 bond, to file the instant complaint. Emery stated to the chancellor that the Committee had saved the bondholders all the expense of reorganization and foreclosure and that they had been "waiting for this kind of a market," and that the only present obstacle to a sale was the instant suit. It appears that Emery and counsel for plaintiff agreed, before the chancellor, that there should be a sale, but counsel wanted a judicial sale under the complaint, and Emery thought the sale could be handled without incurring a lot of fees and expenses. Counsel for plaintiff insists that the Committee be removed and that the chancellor appoint a receiver of the property and order Emery and the Committee to account. This plan, in our judgment, would create expensive and unnecessary

litigation.

The astute counsel for plaintiff urges a number of points why the decretal order should be reversed and the cause remanded with directions to grant plaintiff the relief he seeks in his complaint. It is contended that "the failure to acquire the property for the depositors free from the junior lien during the eighteen year period was in itself sufficient to grant equitable relief," and "the failure to adopt any reorganization plan during the eighteen years was sufficient to warrant the relief." But, as defendants argue, the Committee had full power and authority, under the Deposit Agreement, to sell the property at such time as they might deem for the best interests and protection of the bondholders; that conditions in 1932 and subsequent years were such that there was little the Committee could do except to take possession of the property or foreclose, and the Committee did take possession of the property and obtained title without the expense of a costly foreclosure; that had the Committee instituted foreclosure proceedings during the depression a very small fraction of the original investment would have been returned to the bondholders. It is evident that the bondholders approved the conduct of the Committee. A court of chancery has no right to interfere with the Committee's discretion as long as they acted bona fide and not in an wholly unreasonable and arbitrary manner. We think the chancellor was justified in finding that the Committee acted honestly. The result shows that their judgment was sound. Plaintiff argues that the chancellor

erred in failing to order Emery and the Committee to account to plaintiff. It is sufficient to say in reference to this argument that plaintiff would certainly not be entitled to an accounting unless the chancellor first found the main issues in the suit in his favor.

We have considered several other points raised by plaintiff and find them without any substantial merit.

The decretal order of the Superior court of Cook county should be and it is affirmed.

DECRETAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

44831

THOMAS C. KELLY,)
Appellee,) APPEAL FROM MUNICIPAL
v.) COURT OF CHICAGO.
BLANCHE E. TANNER,)
Appellant.)

339 I.A. 2751

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 18, 1948, Thomas C. Kelly, plaintiff, filed a tort action against Blanche E. Tanner, defendant. The statement of claim reads as follows:

"1. On June 10, 1948 plaintiff was the owner and entitled to the immediate possession of certain personal property, namely, an office desk, 2 office chairs, a filing cabinet, a letter basket, a floor mat, stationery, and office supplies. Said personal property was on said date of the value of two hundred dollars (\$200.00).

"2. On said date, at Chicago, Illinois, the defendant, being then in possession of said property, unlawfully converted the same to her own use; to the damage of plaintiff of two hundred dollars (\$200.00)."

On July 2, 1948, defendant filed the following verified defense and statement of counterclaim:

"The defendant for her defense states as follows:

"1. Denies the allegations contained in paragraphs 1 and 2 of plaintiff's Statement of Claim.

"2. On June 10, 1948 plaintiff was indebted to the defendant in the sum of \$380 for unpaid rent due under a certain lease entered into between the parties on April 30, 1947, a copy of which is attached hereto marked Exhibit

A and made a part hereof, and under paragraph 12 of said lease had a lien on all personal property of the plaintiff contained on the leased premises on account of said rent due and all of said personal property is of a value not in excess of \$40.00.

"COUNTERCLAIM

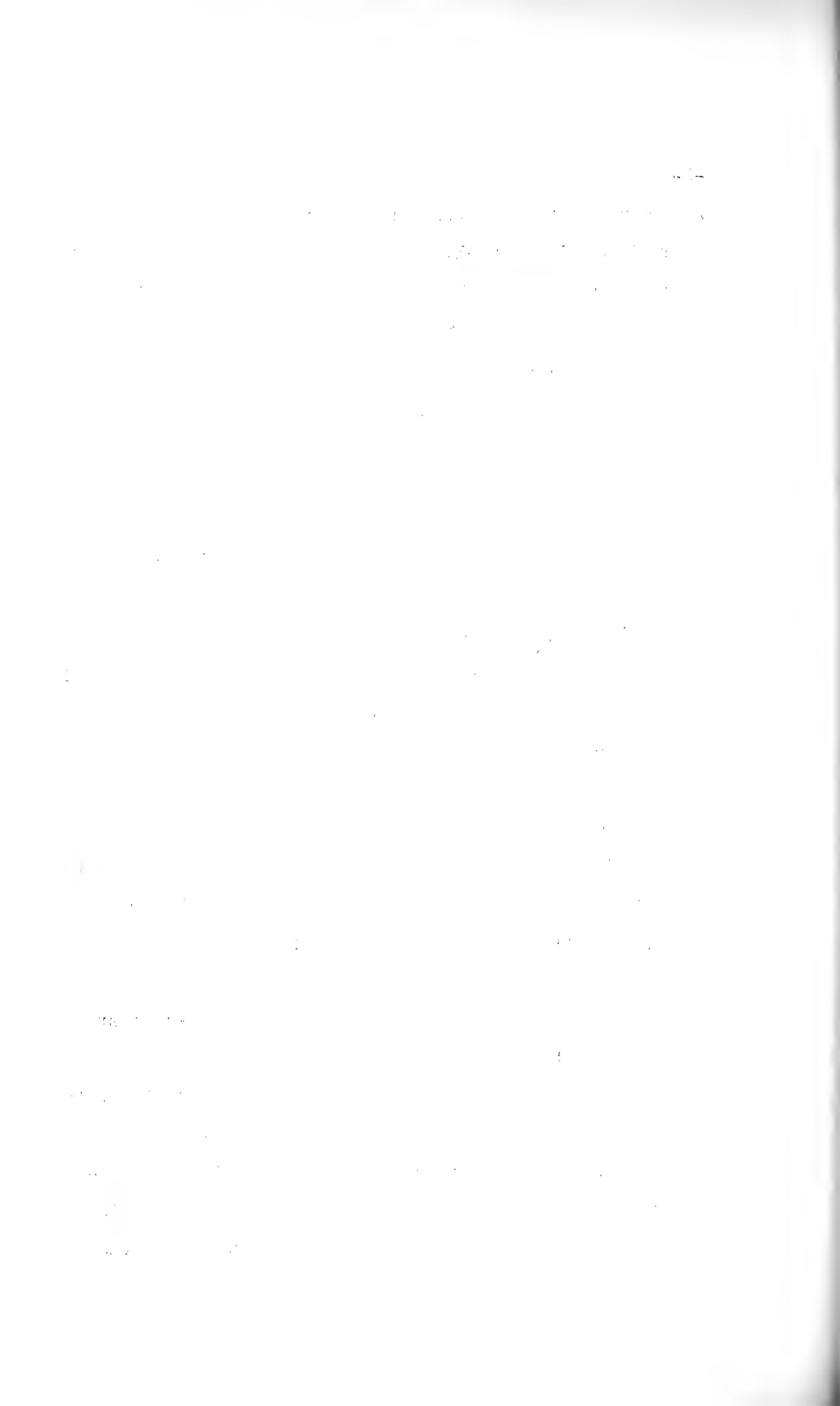
"The defendant as Cross-claimant for her counterclaim states as follows:

"1. The parties hereto entered into a certain lease dated April 30, 1947, copy of which is attached hereto marked Exhibit A and made a part hereof.

"2. The cross-defendant was in possession of the premises during the term of the said lease and remained in, occupied and used the leased premises during the period May 1, 1948, to June 7, 1948, and refused to give up possession of the premises and to pay rent therefor to the cross-claimant.

"3. The cross-claimant is entitled to double rent as liquidated damages in the sum of \$380 for the months of May and June, 1948, as provided in said lease and paragraph 13 thereof; the claim in this paragraph being without prejudice to any other claim the cross-claimant may have against the cross-defendant.

"4. The cross-claimant is entitled to rent for the months of May, June and July of 1948 at the rate of \$95.00 per month, in the total sum of \$285, in that the cross-defendant held over the term of said lease and rent is due to the cross-claimant under a new lease subject to the



same terms and conditions as the said written lease; the claim in this paragraph provided being without prejudice to any other claim the cross-claimant may have against the cross-defendant.

"5. The cross-claimant demands her attorney's fees in this action in the sum of \$120.

"6. The cross-claimant demands interest at the rate of 5% per annum from July 1, 1948, on the sum due to the cross-claimant.

"Wherefore, the cross-claimant prays that this court enter judgment against the cross-defendant in the sum of \$500, or, in the alternative, in the sum of \$405, with interest at 5% thereon from July 1, 1948, and that cross-claimant have her costs in this proceeding."

Plaintiff filed a verified reply to the defense, in which he alleged that he was not indebted to defendant in the sum of \$380 or any sum whatever for rent, and further denies that on June 9, 1948, or at any time thereafter defendant had a lien on any personal property of plaintiff by reason of said lease or otherwise.

The cause came on for trial before the court without a jury and on January 17, 1949, the court entered an order finding defendant, Blanche E. Tanner, guilty as charged in plaintiff's statement of claim and assessing plaintiff's damages at \$90 in tort. Judgment was entered upon the finding and on February 4, 1949, defendant and counter-claimant filed a notice of appeal from that judgment and in the notice stated that the court erred in

failing to enter any order, finding or judgment as to her counterclaim against plaintiff, and she prayed that the judgment of January 17, 1949, be reversed and that she be given judgment here on her counterclaim. On March 21, 1949, the parties went before the trial court and agreed that the court enter a nunc pro tunc order as of January 17, 1949, showing that the court dismissed the counterclaim upon that date.

Thomas C. Kelly, plaintiff, has not filed a brief in this court.

Defendant and cross-claimant (hereinafter called appellant) contends (1) that the finding and judgment in favor of plaintiff as for conversion of his goods and chattels were contrary to the evidence and (2) that she was entitled to judgment on her counterclaim in the amount of \$500, and she asks that the judgment against her for \$90 be reversed and that judgment for her on her counterclaim be entered in this court in the amount of \$500.

Because of the failure of plaintiff to file a brief in this court we were compelled to search the transcript of proceedings in order to determine the merits of the appeal. The transcript of proceedings shows that when the parties went before the trial court on March 21, 1949, there was an important colloquy between the court and the attorneys for both parties, but appellant omitted from the abstract very material parts of the colloquy. It appears from the colloquy that after the trial of the cause appellant retained new attorneys and that the attorney who tried her

case did not appear in the proceedings of March 21, 1949.

We quote from the transcript of proceedings:

"Mr. Heywood [attorney for plaintiff]: Your Honor may remember this case, Kelly vs. Tanner, where Mr. Kelly was suing for the value of his furniture, and the defendant Miss Tanner claimed that he owed her for some rent because he didn't get out.

"The Court: I remember the case.

"* * *

"Mr. Heywood * * * Mr. Johnson here is preparing the record in behalf of Hanson & Doyle [appellant's new attorneys], who are making the appeal, and he agrees with me that we ought to have that half sheet and the record corrected by showing that there was a finding and judgment for the counter-defendant on the counterclaim.

"Your Honor determined that the value of the property was \$200.00 and that he ought to pay something for rent, and to offset that you made a net finding of \$90.00.

"The Court: I thought we made a joint agreement.

"Mr. Heywood: Well, Miss Tanner never formally agreed to it. So Your Honor entered an order and a finding of \$90.00 to the plaintiff, which was the net between the two. And, as I recall, Your Honor made a finding for the defendant on the counterclaim which somehow or other never got down on the half sheet. In other words, as the record now shows, there is nothing done about the counterclaim.

"The Court: You have prepared a draft order?

"Mr. Heywood: Yes, I have. Is that satisfactory to you, Your Honor?

"Mr. Johnson: That should be done. Otherwise, the counterclaim is still pending here.

"The Court: That's right. I thought this was sort of a compromise settlement.

"Mr. Heywood: I wonder, does Your Honor recall enough about the facts to make a statement about it? Mr. Johnson wasn't in the case and I have been trying to tell him about it.

"Mr. Johnson: No, the only thing I was concerned about was that the record show that you ruled on the counterclaim, or else that would still be pending here, and I don't want any part of the proceedings to be pending here.

"* * *

"The Court: I understood that we agreed on that counsel. That was my understanding when we heard it. There was a little feeling there.

"Mr. Heywood: Miss Tanner herself was not in court when the finding was finally made, and she takes the position, I guess, she didn't agree to it. And her counsel at the trial was a different counsel than the present one doesn't admit --

"Mr. Meegan [attorney for plaintiff]: Sure, he had agreed.

"The Court: That was my understanding. We

analyzed the facts and we tried to arrive at an equitable arrangement, which appeared to me to be proper in view of this testimony. I understand that probably there was a little feeling there and I thought that was all worked out.

"* * *

"The Court: No, we want the record complete. It was my understanding that there was sort of a compromise figure.

"Mr. Johnson: I think Your Honor ruled on the counterclaim.

"Mr. Meegan: It was understood that we would have His Honor overrule the counterclaim based on this record. That is why we didn't press it. No, it was definitely understood.

"The Court: We had a conference on it --

"Mr. Meegan: Sure.

"The Court: After I listened to the testimony in the case."

The transcript of proceedings also shows that at the conclusion of the evidence the court invited the counsel into his chambers. From the transcript of the proceedings before the trial court on March 21, 1949, it appears that sometime after the trial court had entered the judgment order of January 17, 1949, appellant retained new attorneys and that Mr. Johnson, who represented them in the colloquy between the court and counsel on March 21, 1949, knew nothing as to the "joint agreement"



between plaintiff's attorney, appellant's attorney and the trial court at the time the court decided the cause on January 17, 1949. It also appears from the proceedings on March 21, 1949, that appellant was not in court on January 17, 1949, at the time the trial court made his findings and entered judgment, and that she took the position, apparently, that she was not bound by the "joint agreement." It is hardly necessary to state that she was bound by the action of her then attorney at the time the "joint" agreement was made. It is clear from the statements made by the trial court at the time of the colloquy that he made his findings upon the assumption that the parties agreed to the findings. In our judgment appellant is in no position to complain of the findings and judgments entered in the cause.

The judgment order of the Municipal Court of Chicago entered January 17, 1949, is affirmed; and the judgment order of the Municipal Court of Chicago entered March 21, 1949, nunc pro tunc as of January 17, 1949, is also affirmed.

JUDGMENT ORDER ENTERED JANUARY
17, 1949, AFFIRMED.
JUDGMENT ORDER ENTERED MARCH
21, 1949, NUNC PRO TUNC AS OF
JANUARY 17, 1949, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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45026

SONNEY AMUSEMENT ENTERPRISES,
INC., a California Corporation,

Appellee,

v.

ASTOR ENTERTAINMENT CO., INC.,
a Corporation, and DWAIN ESPER.

On Appeal of DWAIN ESPER,

Appellant.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT, COOK COUNTY

3391A-2-5²

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant Dwain Esper appeals from an interlocutory order of the Circuit Court of Cook County denying his motion to dissolve an injunction issued on October 6, 1949, without notice.

The complaint alleges substantially that plaintiff, a California corporation, is engaged in the business of producing and leasing moving picture films which it owns; that defendant Astor Entertainment Co., Inc., a corporation, hereinafter referred to as Astor, is engaged in exhibiting moving picture films, and that at the date of the filing of the complaint, was exhibiting to the general public, for an admission charge, a certain film entitled "How to Undress in Front of Your Husband," which belonged to the plaintiff. The complaint further alleges that plaintiff "is informed" that the defendant Dwain Esper had entered into a contract with the defendant Astor for the showing of said film for a consideration to be paid to him by Astor; that defendant

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Esper has violated the ownership rights of plaintiff by permitting the film to be exhibited at the Astor Theatre in Chicago; that the plaintiff "is further informed" that the defendant Astor has in its possession certain funds which it intends to pay over to the defendant Esper for the use of the film, but all moneys for the use of the film should be paid to the plaintiff as the lawful owner, as well as the earnings, gains and profits in connection with its showing. On the basis of these allegations the order appealed from was entered which directed that a restraining order issue instantter, without notice, ordering defendant Astor to refrain from paying to defendant Esper any money for the use of rental, exhibiting or showing of the film and from turning over to Esper the motion picture film or any print, copy or duplicate until the further order of the court. It was further ordered that the plaintiff file an injunction bond in the sum of \$1,000 "with good and sufficient surety to be approved by the court before said Writ shall issue."

The motion for the dissolution of this injunction was upon the grounds (1) that Esper was never served with notice of the motion for injunction upon which the order was entered; (2) that in the order no time was set for the giving of the bond by plaintiff; (3) that it does not appear from the complaint or affidavit accompanying the same that the rights of the plaintiff would be unduly prejudiced if the injunction was not issued immediately and without such notice; and (4) that there is no basis in the complaint

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for the issuance of the injunction. The failure of the court to dissolve the injunction for substantially these reasons is here assigned as error.

Courts of this State have frequently held that an injunction will not be issued without notice unless it is made clearly to appear from the complaint or affidavit that the right of the plaintiff will be unduly prejudiced by the giving of such notice. Brin v. Craig, 135 Ill. App. 301; Crown Bldg. Corp. v. Monroe Amusement Corp., 326 Ill. App. 430, 435. We find no allegation in the complaint which would justify the issuance of an injunction without notice. We have held that where a preliminary injunction is issued without notice in a case where notice should have been given, it is the duty of the court without reference to the merits of the cause to reverse the injunctive order. Lange v. Massachusetts Mut. Life Ins. Co., 273 Ill. App. 356; Kessie v. Talcott, 305 Ill. App. 627.

Furthermore, we are of the opinion that the complaint failed to state a cause of action in equity. The complaint does not allege that the plaintiff has no adequate remedy at law. On the contrary, it sets forth a cause of action which is patently remedial at law. There are no allegations that either of the defendants is insolvent or that they cannot respond in damages, that the film could not be restored to the plaintiff by replevin suit or other action, that the film had any unique value which could not be recovered at law, or that the accounting requested by the plaintiff was complicated or intricate and could not have been ascertained by a jury. Where the

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rights in personal property can be determined by a suit in replevin, equity will not interfere. Thurber Galleries v. Rienzi Garage, 238 Ill. 35.

We do not deem it necessary to consider the other assignments of error in view of what is here held. The order denying the motion to dissolve the injunction is reversed and the cause is remanded to the Circuit Court of Cook County with directions that the injunction herein issued be dissolved.

REVERSED AND REMANDED
WITH DIRECTIONS.

Niemeyer and Feinberg, JJ., concur.

44822

THOMAS KING,
Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

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33211261

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for personal injuries received as a result of a collision between a taxicab being driven by him and a streetcar operated by defendant company about six o'clock on the morning of October 12, 1946. There was a trial by a jury and verdict for plaintiff in the sum of \$22,500. As a result of the collision plaintiff's left arm was so badly injured that it was necessary to amputate the same above the elbow, and he received other serious injuries.

Defendant contends (1) that plaintiff was guilty of contributory negligence as a matter of law, and (2) that the verdict was against the manifest weight of the evidence and the trial court should have granted a new trial.

At the time of the accident plaintiff's cab was being operated in a northerly direction on Prairie Avenue. It was fairly light and the visibility was reasonably good. Defendant's streetcar, a one-man operated car, was being driven in an easterly direction on 61st Street, approaching Prairie Avenue. Sixty-first Street at this point is a through

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street, intersecting Prairie Avenue at right angles, and is protected from Prairie Avenue traffic by stop signs on the latter street. The south stop sign was along the east curb of Prairie Avenue 18-1/2 feet south of the south curb of 61st Street. Prairie Avenue is 50 feet 6 inches wide and 61st Street is 42 feet wide between curbs. The sidewalk on the west side of Prairie Avenue is 24 feet 8 inches in width.

Plaintiff testified that at the time of the accident he was alone; that he was familiar with the neighborhood where the accident happened; that there was little traffic at the time; that shortly before the accident he was driving on the right side of the street, about 7 or 8 feet from the curb, going about 25 or 30 miles an hour; that as he approached the corner of 61st Street he stopped, although he did not come to a complete standstill, and there took his car out of high gear and put it into first gear; that he looked to his left and saw a streetcar approaching on 61st Street, traveling east, about 80 feet west of the intersection and "it looked like it was stopping some or slowing down"; that he then started moving into the street and looked to the east, but was unable to see very far because there were cars parked along the south curb; that he continued to look east and at that time his car had about reached the eastbound rail and the streetcar was but a few feet from him; that he pulled to the right to try to get out of the way, but that the streetcar kept coming, and that the collision then occurred. He testified that at that

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time he was going about 8 miles an hour and the streetcar was going pretty fast.

The plaintiff's statement that the streetcar had slowed down as it approached the intersection is corroborated by other witnesses, including those appearing for both defendant and plaintiff. It also appears, without contradiction, that the streetcar continued on eastward after the collision until the front end of the streetcar had reached a point some 80 feet east of Prairie Avenue and that the trucks of the streetcar were derailed. Plaintiff's vehicle was crushed between the side of the streetcar and a vehicle parked east of Prairie Avenue on the south side of 61st Street.

Plaintiff's story was corroborated in part by several witnesses, one of whom, a passenger on the streetcar, testified that the cab was being driven slowly into the intersection at about 3 or 4 miles an hour and the motorman of the one-man streetcar was engaged in conversation with one of the passengers on the platform of the car immediately before the accident. One of defendant's witnesses, Robert Baker, testified that the streetcar had slowed down for Prairie Avenue and that it picked up speed again prior to the accident.

For the streetcar company, several witnesses, including the witness Baker, testified that the cab did not slow down or stop ^{before} coming through the stop sign on Prairie Avenue, and the witness Baker testified that the cab was 50 or 75 feet from the streetcar at the time the streetcar started to cross Prairie Avenue. Substantially to the same

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effect was the testimony of Paul Budach, a passenger on the streetcar; Nathaniel Robinson, a passenger; Richard Gray, a passenger; and Arthur Shoulders, a passenger. Each of these witnesses testified that the cab hit the streetcar and as a result the streetcar was driven off the track. The motorman testified that he was operating the streetcar at about 12 or 15 miles an hour as he approached the intersection and saw the automobile; that the automobile was then about at the alley approaching 61st Street, so he sounded his bell and went across; that he had got almost to the east side of the street when he noticed the car coming at a great rate of speed, and, realizing that he was going to be hit, locked his brake and threw the streetcar into reverse; that his car was knocked from the track by the force of the collision and that he had no control over it after that.

From the testimony it is to be observed that there was a conflict of testimony upon certain material facts. We have concluded from a careful examination of the entire record that it raised questions of fact and inferences which were properly submitted to the jury for decision, and we are unable to say as a matter of law that the plaintiff was guilty of contributory negligence or that the verdict is against the manifest weight of the evidence. ✓

Defendant cites a number of cases involving accidents at railroad crossings where plaintiffs have been found guilty of contributory negligence as a matter of law; but obviously the question of contributory negligence depends upon the facts and circumstances in a particular case. No



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single rule which may have been announced in any particular case can be held applicable to all other cases where facts and circumstances differ. The facts in this case more closely resemble those in the case of Loftus v. Chicago Railways Co., 293 Ill. 475, than those in any case cited by counsel for either party. In that case the decedent, a pedestrian, observed an eastbound streetcar approaching as he walked north on the west side of Hoyne Avenue across its intersection with 12th Street, an east and west street in the City of Chicago. When about 3 or 4 feet from the track he hesitated, and then started to cross hurriedly. At that point the streetcar was a distance variously estimated at from 6 to 75 feet away. He was struck and killed before he got across the track. Upon the question of contributory negligence raised in this case, the court said ^{at} page 479:

"* * * If the car was as much as 75 feet from the deceased when he arrived at the conclusion to cross in front of it, we could not positively declare that a reasonably prudent person under like circumstances and in the same situation as the deceased would have drawn the conclusion that by crossing in front of the car he was putting himself in a place of peril, but, on the other hand, that he believed, and had reasonable ground for believing, that he could cross in safety. In considering this question the jury had a right to consider not only the question of distance that the car was away from the deceased, but also the further fact that the car at about this time had begun to slow down its speed and would probably stop at the crossing. * * *"

In the case of Chicago City Ry. Co. v. Sandusky, 198 Ill. 400, the court said at page 402:

"* * * Attempting to cross the track of a street railway ahead of a moving car is not necessarily to be imputed as contributory negligence. It may or may not be prudent, depending upon the proximity of the car and the speed with which it is moving. Whether, in the particular instance, reasonable care was exercised in going upon the track is usually a question for the jury, under proper instructions. * * *"

We have reviewed the many cases cited by the defendant, but, as hereinabove indicated, we are of the opinion that they are not applicable to the fact situation here presented. Therefore, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Niemeyer and Feinberg, JJ., concur.

44834

L. E. KAHN and M. F. DRESDNER,

Appellees, and Cross-Appellants,

v.

ANNIE LOEFFLER, individually and as
Trustee under the Last Will and
Testament of ADOLPH LOEFFLER, Deceased,

Appellant, and Cross-Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE TUOHY DELIVERED **THE** OPINION OF THE COURT.

Plaintiffs L. E. Kahn and M. F. Dresdner filed their complaint in chancery in the Superior Court of Cook County against Annie Loeffler, individually and as trustee under the last will and testament of Adolph Loeffler, deceased, seeking an injunction to restrain defendant from prosecuting her forcible entry and detainer suit pending on the law side of the Superior Court and from terminating a certain existing lease wherein plaintiffs were lessees and defendant was lessor (by succession). The complaint, by amendment, prayed for a reformation of the lease to allegedly express the true intention of the parties concerning the so-called "percentage rentals." Defendant filed a counterclaim alleging failures in the maintenance and making of repairs upon the premises and failure to fully account for apartment rentals, in violation of the covenants of the lease. The cause was referred to a master in chancery to hear evidence on the alleged defaults in maintaining and repairing the premises, and

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the chancellor heard evidence on the matter involving the failure to account for apartment rentals. The court entered a decree approving the findings of fact of the master to the effect, that there had been numerous defaults, but, notwithstanding, granted the injunction to restrain the prosecution of the forcible entry and detainer suit. The decree also found that plaintiffs were indebted to defendant for certain "percentage rentals" and that defendant was entitled to recover a portion of the costs, expenses, and attorney's fees prayed. Error is assigned by both parties.

The defendant-appellant complains of the decree in the following particulars: (1) that the evidence established that plaintiffs had violated material provisions of the lease in failing to properly maintain and keep the building in good state of repair, that the breaches were such as to require a declaration of forfeiture, and that it was error to enjoin the defendant from proceeding with her forcible entry and detainer suit; (2) that an inadequate amount was allowed as rental for certain apartments in the building, for which plaintiff had failed to account, and in failing to allow any amount of interest on sums due; (3) that it failed to allow defendant reimbursement in full for her costs, expenses and attorney's fees in the litigation; and (4) that it failed to allow liquidated damages as provided in paragraph 15 of the lease.

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The property here involved, known as Lincoln Park Arms Hotel, located at 2738 Pine Grove Avenue, Chicago, Illinois, is a fourteen-story apartment hotel containing 185 furnished apartments. The original lease was executed by the 2738 Pine Grove Building Corporation, an Illinois corporation, by Adolph Loeffler, President, Adolph Loeffler and Annie Loeffler as lessors, and the plaintiffs L. E. Kahn and M. F. Dresdner as lessees. Adolph Loeffler was the husband of defendant Annie Loeffler who witnessed the lease as secretary of the lessor corporation. The term of the leasing was for 10 years commencing March 1, 1944 and expiring February 28, 1954. It called for payment as rental the sum of \$500,000, in equal monthly installments of \$4,166.66 each. In addition to this "fixed rental," the lessee was required to pay to the lessor, the sum equal to 33-1/3% of the gross monthly receipts of the building in excess of \$11,500 for each month of the term. The building at the time of the leasing was equipped with the various appurtenances, fixtures and appliances, and other personal property suitable for the operation of an apartment hotel. Clause 4 of the lease provided as follows:

"The Lessee agrees to keep the furniture, furnishings, and equipment, including all improvements, additions and replacements thereto in a good state of repair and in good condition in every respect, and to replace such of said furniture, furnishings and equipment as may be worn out, broken, destroyed, damaged, lost or stolen, with other articles of like kind and equal value, and not to remove any part of said furniture, furnishings and equipment, or improvements, additions and replacements thereof from said premises, nor to lend or part with possession

thereof either directly or indirectly, and to surrender up possession of said furniture, furnishings and equipment, including all additions and replacements thereof at the termination of possession of the demised premises by the Lessee in good condition and state of repairs, ordinary wear and tear excepted."

Paragraph 7 of the lease provided:

"Lessee covenants and agrees that he will keep the demised premises including, but without by this enumeration limiting the generality of the foregoing, the building, machinery, equipment, heating plant, plumbing, elevators, lifts, floors, walls, electric light wiring, refrigerators, the canopy at the front entrance, screens and all other machinery and equipment in good repair at all times during the term of this lease, and will pay all costs thereof, and save and keep harmless the Lessor from the payment of the same, and will keep said demised premises and the steps, stairways, halls and passageways thereof, and the alleys and sidewalks adjoining the demised premises in good clean condition at all times during the demised term, and will pay all costs thereof, and save and keep harmless the Lessor from the payment of same, and further, without injury to the roof of said building, will at his own expense, remove the snow and ice from the same when necessary, and clean the snow and ice from the sidewalks adjacent to said premises. * * * Lessee shall allow Lessor, his agents, employees or representatives, or any other person thereunto authorized by Lessor, free access to the demised premises for the purpose of examining the same to ascertain if the demised premises are in safe, tenantable, clean, sanitary and good condition, order and repair, and to put said premises or any part or parcel thereof in such condition, order and repair, and to exhibit the same to prospective purchasers or tenants of the demised premises, or any part thereof."

In this connection it was recited under clause 3 of the lease as follows:

"The Lessee has simultaneously with the execution hereof deposited with the Lessor the sum of Twenty-five Thousand Dollars (\$25,000.00) to secure the full and faithful performance of the Lessee's covenants, agreements and conditions by him to be kept and performed hereunder. In the

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event default shall be made in the payment of rent or other sums required to be made by the Lessee hereunder, or default shall be made by the Lessee in the performance of any of the other covenants, agreements or conditions by him to be kept and performed hereunder, the Lessor may at its election, without notice and without terminating this lease, apply said deposited funds in payment of rent or other sums due hereunder or in remedying any other default hereunder, or the Lessor may terminate this lease by reason of any such default and retain said fund as liquidated damages for any such default, and not by way of penalty.***"

The master found. that defaults had been permitted to occur in that plaintiffs had failed to keep the elevators, heating plant, refrigeration system, and piping in good repair, had failed to replace certain wash basins, furniture, linens, bedding and carpeting where necessary, and had allowed the premises to become and remain in an unclean condition; that many of the apartments were in need of decorating, the furniture needed reupholstering and the carpets needed replacing. It further appeared from the master's report and findings of the court that on May 28, 1947, attorney Sullivan, shortly after being retained by defendant, wrote to the plaintiff L. E. Kahn, calling attention to the fact that plaintiff had failed to keep the mechanical equipment and elevators in good state of repair and also complaining that four apartments in the building were being occupied rent-free in violation of paragraph one of the lease; that between the date of the receipt of this letter, which was the first time that defendant had called plaintiff's attention to the matters complained of, and the date of the filing of the forcible entry and detainer suit on September 15, 1947, the plaintiffs expended approximately \$20,000 for repairs and maintenance, and that during the

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twelve-month period immediately following the date of the filing of the forcible entry and detainer suit the plaintiffs expended an additional \$30,000 for the same purpose. It also appears that for this year in which these expenditures were made the plaintiffs suffered a loss approximating \$8,000 from the operation of the building.

Defendant contends that, the master having found substantial defaults to exist by reason of the tenants' failure to maintain the building in conformity with the covenants of the lease and the decree having approved these findings, the chancellor was guilty of reversible error in restraining the prosecution of the forcible entry and detainer suit.

We disagree with this contention of defendant. It is our opinion that notwithstanding the defaults proven the court had a right in the exercise of reasonable discretion to determine whether the defaults were such as to require a declaration of forfeiture. If the chancellor's discretion was reasonably exercised, we have no right to interfere with his judgment, and we are unable to say, upon a consideration of all the evidence before us, that the chancellor abused his discretion in this respect. The fundamental applicable rule of law is that equity abhors a forfeiture and will relieve against termination of a lease where equitable circumstances require. Springfield, Etc. Trac. Co. v. Warrick, 249 Ill. 470; Clark-Devon Bldg. Corp. v. Hinrichs, 308 Ill. App. 69.

In the light of these decisions there were a number of equitable considerations which it was proper for the



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court to take into account on the question of whether or not a forfeiture should be declared. One of these was the fact that under clause 3 of the lease lessees had a deposit of \$25,000 with the lessor which the latter could use for remedying any default without notice. It is true that there was no requirement under the terms of the lease that this amount or any portion be applied for this purpose, but the chancellor, engaged in an equitable examination, was justified in concluding that the lessor was not helpless against the existing defaults but might have, to a very considerable extent, remedied them by applying the deposit or a portion of it for this purpose. The chancellor was also entitled to consider that during the four-month period between the time that the lessor had first called to the lessees' attention the defaults complained of and the date of the institution of the forcible entry and detainer suit, plaintiffs expended approximately \$20,000 in an attempt to cure the defaults. It was not, in our judgment, an abuse of discretion for the chancellor to find that plaintiffs were encouraged to believe that no such drastic action as ^{forfeiture} would be invoked if substantial pecuniary attempts were made to cure the defaults. It was also proper for the chancellor to weigh, as bearing upon the good faith of the plaintiffs, the fact that the sum of \$30,000 additional was expended in the 12 months immediately following the institution of the forcible entry and detainer suit. Furthermore, there was no exact standard by which to measure the extent of the failure to place the building in the condition that existed when it was taken over, for the reason that it does not appear from the record in just what condition the premises

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were in at the time that possession was given to the lessees. Some light is shed upon this question by the fact that the building was 20 years old, had an average rental of something like \$2.00 a day per room, and that an inventory made at the time the premises were taken over shows roughly that 80 per cent of the contents was in fair condition, 12 per cent in good condition, and 8 per cent in poor condition. The court could take judicial notice that the period involved was during the closing days of the war and immediately thereafter, at a time when abnormal conditions made it difficult, and in some instances impossible, to procure competent labor and replacement items.

Defendant, in support of her contention that the defaults required a forfeiture, places considerable reliance upon the English cases of Bracebridge v. Euckley, 2 Price 200, (1816), and Hill v. Barclay, 18 Ves. 56, and two American cases which follow the English rule, namely, Winn v. State, 55 Ark. 360, and O'Byrne v. Jebeles & Colias Confectionery Co., 165 Ala. 183, where the rule is announced that equity will not relieve against a forfeiture for breach of a covenant to repair. Without here analyzing these cases, it is sufficient answer to say that this doctrine has been expressly repudiated by the courts of this State. In Clark-Devon Bldg. Corp. v. Hinrichs, supra, which was a proceeding to enjoin the forfeiture of a 99-year lease where the forfeiture was sought upon the grounds that the tenant had defaulted in its obligation to reconstruct a building which had been taken in condemnation proceedings, the court, in quoting from the case of Mayer v. Collins, 263 Ill. App. 219,

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cited the case of Illinois Merchants Trust Co. v. Harvey.

335 Ill. 284, which held:

"The source of the right in the landlord to declare a forfeiture is not important. We are unable to see any difference between a right given by statute and one arising from any other source. The basis of the relief is that the defendant is seeking to exercise a right which he has but which he should not be permitted to exercise."

This court then said, at page 77:

"It would unduly extend this opinion to undertake to review and distinguish all the cases cited in the briefs filed in this case, which are full and complete. The subject is a difficult one. The Illinois courts have never approved the reasoning in the English cases on which defendants rely.
* * *"

The rule in this State as to the powers of a court of equity to grant or refuse relief in the circumstances before us is well stated in Springfield, Etc. Trac. Co. v. Warrick, supra. In that case the deed to the appellee railroad company provided that if the railroad company should fail to construct its proposed railway within a certain period of time, between specified points, the land should revert back and become the property of the grantors. The railroad company failed to complete its line within the prescribed time, although the court concluded from the evidence before it that the railroad company had in good faith attempted to comply with the time provisions. The court, in granting an injunction to restrain the prosecution of the ejectment suit and the forfeiture of the deed, said at pages 474, 475:

"* * * Forfeitures will be enforced by courts in clear cases, but they are not regarded with favor, and their prevention is within the protecting care of equity whenever wrong or injustice will result from their enforcement. * * *

"* * * In equity the harsh remedy of forfeiture

yields to compensation when fair dealing and good conscience seem to require it. * * * When equity is applied to for the rescission, cancellation and delivery up of deeds or agreements, the court is not bound to pass upon the question as a matter of absolute right, but it is one within the sound discretion of the court, to be exercised in granting or refusing the relief, according to the court's own notion of what is reasonable and proper under the circumstances of the particular case. * * *"

Furthermore, no injury to the premises in question having been shown which either has not already been, or which may not be, remedied by compensation, or, more properly, the expenditure of money for repairs, the court properly exercised its discretion upon this question of forfeiture.

In view of the conclusion at which we have here arrived, it will be unnecessary to consider the contention with reference to the claim for liquidated damages as provided in paragraph 15 of the lease.

We come to a consideration of whether or not the chancellor correctly decided that defendant was entitled under the lease to rental from the four apartments for which no rental had theretofore been paid, and, if he did properly decide that question, whether or not the amount arrived at was correct. Error is assigned by the plaintiffs upon the findings of the decree that any rental is due for these apartments, and defendant complains that the rent allowed is in an improper amount. The facts are undisputed that from the time the lessee took possession of the premises no rent was paid upon the four apartments occupied respectively by the lessee Kahn and three of his employees. The lease, paragraph 24, provides:

"* * * and no person shall be permitted to occupy any portion of said premises without paying a reasonable rental therefor."

Plaintiffs argue that the parties at the time of the fixing of the basic rent, as distinguished from the percentage rental, fixed a figure as basic rent which excluded the rental on these four apartments. They also argue that it was customary to permit certain employees, such as the housekeeper, engineer, manager, and assistant manager, in buildings of a similar kind and character, to occupy apartments rent-free. We see no basis here for resorting to either the intention of the parties or to custom for the reason that the parties by the clear and unambiguous language above quoted provided that a reasonable rental should be paid for all the apartments. The court properly decided that the plaintiffs should account to the defendant for the rental on these apartments during the period of occupancy. Accordingly, we find no error in denying the prayer of the complaint for a reformation of the lease to show the intention of the parties on the "percentage rentals."

The decree found that there was due the sum of \$6,034.71 as rental for these four apartments for which no rental had ever been paid. Defendant claims that the amount due is \$7,668. Conflicting testimony as to valuations was offered. Plaintiff Kahn, who prior to the time that he leased the hotel was an auditor in the employ of Loeffler and who, although interested, was qualified and testified substantially without objection, was the only witness offered on behalf of plaintiffs. Defendant's evidence in this respect is based upon the testimony of an independent auditor. While the testimony is not altogether

satisfactory and contains discrepancies, we are inclined to regard the finding as being particularly within the purview of the chancellor, and, in the absence of grave misconceptions of fact, are not inclined to disturb his finding. We are of the opinion that there was sufficient evidence to justify his conclusions. However, the court should have allowed interest on the item that he found to be due, at 7 per cent (as provided by clause 16 of the lease), from rental due dates until the date of the decree.

On the question of attorney's fees, both parties complain. Plaintiffs insist the court was in error in allowing any attorney's fees, the defendant urging that the \$1,500 allowed is entirely inadequate and based upon no evidence in the record, by the court's own statement. Plaintiffs' argument, to the effect that the defendant's attorney is entitled to no attorney's fees, is predicated upon the proposition that the trial court found against the defendant upon the most important issue in the case and granted an injunction restraining the prosecution of the forcible entry and detainer suit. Defendant cites clause 27 of the lease providing as follows:

"Lessee shall pay and discharge all costs, expenses, and attorney's fees, which shall be incurred and expended by Lessor in enforcing the covenants and agreements of this lease, whether by institution of litigation or otherwise."

Defendant further maintains that the undisputed evidence shows that defendant has paid her attorney the sum of \$20,000 for expenses maintained in enforcing the covenants of the lease and that this amount should have been allowed by the chancellor under clause 27 of the lease. We are not

wholly in accord with the arguments of either of the parties. While it is true, as the plaintiffs contend, that the injunctive relief sought by plaintiff was granted and to this extent the claims of the defendant were denied, the evidence clearly shows that considerable benefit accrued to defendant as the result of the effort of her attorney. In the first place, it was established as a result of this litigation that the plaintiff was obligated to pay to the defendant the principal sum of \$6,034.71 by way of accounting for the unpaid rentals upon the four apartments in question, a sum which we here hold to be increased by the payment of interest. It also appears that following demands and complaints made by attorney for defendant certain defaults were remedied by way of maintenance and repairs, including the expenditure within the next 18 months of the sum of \$50,000, all of which went to the benefit of defendant's property.

We are of the opinion that attorney's fees were allowable under the provisions of the lease hereinabove quoted. Defendant urges that the amount of \$20,000 which defendant paid her attorney is the amount which necessarily should be allowed as costs in this case. We disagree with this contention. Defendant's attorney was free to contract with his client upon the question of attorney's fees in attempting to enforce defendant's rights as he understood them. The trial court disagreed with the contention of defendant upon a substantial portion of the alleged rights here asserted, and in so doing we have found that he committed no error. Defendant is entitled to have taxed as attorney's fees the reasonable value of the services, only

to the extent that they were of assistance in accomplishing beneficial results here. We are of the opinion, however, that in fixing fees the court should have based his findings upon competent evidence, and in arriving at the sum of \$1,500 he did so admittedly without any proper foundation. Defendant objects to the following statement of the trial court: "The attorney's fees is always a more difficult item. It is a guess. It is a thing that, especially in this case, I haven't got detailed hours and rates, etc., as in some cases. * * * So that I do not have a fairly definite basis on which to judge, first amounts, and second, the same question we had above, who is responsible. * * * We do not let witnesses guess at things, but judges have the right to, apparently, under the highest court's action in many cases." We are compelled to agree that the objection is well taken and that the trial court should have heard competent evidence as to reasonable value of the services. In view of this fact, we are constrained to reverse and remand with directions to the trial court to fix the attorney's fees in an amount which shall be based upon competent evidence of the reasonable value of defendant's attorney's fees.

As to the other complaints as to the allowance of costs, we are in accord with the finding of the trial court.

Accordingly, the decree is affirmed in part and reversed in part, and the cause is remanded with directions to proceed in conformity with the views herein expressed.

AFFIRMED IN PART; REVERSED IN PART
AND THE CAUSE IS REMANDED WITH
DIRECTIONS.

Niemeyer and Feinberg, JJ., concur.

44884

CHARLES G. BONAMER,

Appellant,

v.

MARY MAHANNA, Administrator of
the Estate of SIDNEY J. MAHANNA,
also known as SAMUEL J. MAHANNA,
Deceased,

Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

3391A.277

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Claimant appealed to the Circuit Court of Cook County from an order of the Probate Court of said county allowing the sum of \$750 upon a claim filed for \$2,075.91. The Circuit Court disallowed the claim in its entirety and entered judgment for the administratrix. From this order, claimant appeals.

The cause of action is based upon a promissory note dated April 1, 1930, for \$2,000 executed by Sidney J. Mahanna, (also known as Samuel J. Mahanna), deceased, payable to the order of claimant and due one year after date, with interest at 6% per annum after date. The sole defense is that the note is barred by the ten-year Statute of Limitations. Both sides agree that there was no basis for the Probate Court's action in allowing the claim for \$750 and agree that either judgment should have been for the amount claimed or the claim disallowed.

The original note, introduced as claimant's exhibit 1, indicates on its face that it was subject to the defense of the Statute of Limitations, and, such defense

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having been raised, the burden was upon claimant to show that the statute was inapplicable. In support of his argument that payments were made on the note removing it from the operation of the statute, claimant offered in evidence exhibits numbered 2 to 8 inclusive. The court refused to admit exhibits 3 to 8 in evidence, and such ruling of the court is assigned as error.

Exhibits 3, 5 and 7, dated respectively September 10, 1937, April 9, 1940, and December 9, 1942, are receipts, signed by the decedent, acknowledging payments from the savings department of the Lawndale National Bank of Chicago of withdrawals in the sums of \$500, \$450 and \$400 respectively. Exhibit 3 bears on the back the words Mrs. Fannie Bonamer, and on exhibit 5 are the words Charles Bonamer, Fannie, 500.00. There is no further identification on Exhibit 7. These receipts were apparently offered for the purpose of showing that decedent made withdrawals from the bank on the dates when it is claimed payments were made in similar amounts on the note in question and that they tend to corroborate this contention. We are of the opinion that the documents were without probative value and the trial court had no recourse but to refuse their offer in evidence.

Claimant's exhibit 4 consists of a cashier's check for \$500 in favor of Mrs. Fannie Bonamer, on the reverse side of which appears the legend "Part payment on my note for \$2000." There is no competent proof that the note referred to in the legend on the back of this document is the same note upon which suit was brought. The inference is to the contrary inasmuch as it is not made payable to the claimant,

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but to the claimant's mother. Even if it were intended as a payment on the note in question, it appears from the date on its face, namely, September __, 1937, (the exact date is unintelligible), that it would be subject to the defense that it was within the period of the ten-year Statute of Limitations.

Claimant's exhibit 6 is a cashier's check in the sum of \$500, dated April 9, 1940, payable to the order of Charles Bonamer and Fannie Bonamer, bearing on the back of the instrument the notation "Payment on \$2000.00 loan to Chas. Bonamer & Fannie Bonamer," and indorsed by Charles Bonamer and Fannie Bonamer. Claimant's exhibit 8 is a cashier's check for \$400, drawn on the ~~Lawndale~~ National Bank and payable to the order of Charles Bonamer and Fannie Bonamer. It bears no indorsement other than the names of Fannie Bonamer and Charles Bonamer.

Claimant's case rests in great measure upon the probative value of the two checks identified as claimant's exhibits 6 and 8. The rule in this State has always been that claims against estates of deceased persons should be scrutinized with care and such claims must be proven by clear and convincing evidence. In re Estate of Busse, 332 Ill. App. 258; Floyd v. Estate of Smith, 320 Ill. App. 171.

It has also been held that in order for a part payment to toll the Statute of Limitations it must be clearly shown that the part payment was made by the debtor on the particular debt in question, and the debt must be identified with the part payment at the time such payment was made. Joseph v. Carter, 382 Ill. 461; Chapin & Gore v. Estate of Powers, 270 Ill. App. 382.

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In the instant case it is to be noted that the checks were made payable, not to the claimant, but to the claimant and Fannie Bonamer, his mother. Claimant argues that inasmuch as no indebtedness is shown to have existed on the part of the decedent to anyone other than Charles Bonamer, there is a presumption which, in the absence of contrary evidence, becomes conclusive that the payments were made to apply upon this obligation. One of the witnesses called on behalf of the claimant, Joseph J. Mahanna, testified that the deceased debtor told him that the decedent was going to make a withdrawal from a bank for the purpose of paying a debt due to Fannie Bonamer, the decedent's sister. This conversation took place on December 10, 1942, is undisputed, and tends to prove an existing indebtedness of decedent to his sister and the inference arises that the checks in question were to apply upon this indebtedness rather than upon the note in question.

The final point for consideration arises out of the admission in evidence of claimant's exhibit 2, which was a photostatic copy of the original note sued upon, containing on its reverse side a number of notations which claimant testified were in his handwriting, purporting to be records of payments made by decedent to claimant on the \$2,000 note in question. He testified that each entry was made on the date payment was received by him and that the entries were true and correct. Claimant was permitted to testify over the vigorous objection of counsel for the administratrix, who urged that, the claimant being a party in

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interest and the estate defending by its administratrix, the claimant was an incompetent witness. The trial court permitted the claimant to testify upon the theory that the document constituted a book account and was admissible under section 3 of the Evidence and Depositions Act. Upon the conclusion of all the testimony the trial court of its own motion struck the exhibit from the record, apparently upon the grounds that no sufficient foundation was laid to bring the documents within section 3 of the Act. The court specifically stated that in his opinion the notations were not made at the times that the original payments were alleged to have been made, but were all placed upon the document at the same time by the claimant. Upon a consideration of all the evidence we are not disposed to interfere with the finding of the trial court.

We are of the opinion that the trial court was justified in concluding that no such clear and convincing proof was made as is required to take the case out of the operation of the Statute of Limitations. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Niemeyer and Feinberg, JJ., concur.

44894

FREDERICK H. STRAUSS, et al.,

Appellees,

v.

SOL BORIS and RALPH BORIS,
doing business as BORIS BROS.,

Appellants,

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

3 29 1 1 2 31

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendants appeal from orders entered April 18, 1949, and May 5, 1949, by the Circuit Court of Cook County, denying defendants' petitions to vacate a judgment by confession entered on a written lease. The amended petition alleges substantially that the premises are located at 7008 South State Street, rear, and were demised to the defendants to be occupied for the sale of "Eggs and Poultry, wholesale only"; that at the time of the execution of the lease there was in effect a zoning ordinance of the City of Chicago, section 194A-11 of the Municipal Code, and that the purpose for which the lease was executed was prohibited by said ordinance and the lease was void. The petition further alleges that at the time of the execution of the lease and for a long time prior thereto, defendants were engaged in the wholesale poultry business at another address and that they desired to engage in a similar business under the present lease, of all of which the lessors were informed; that after taking possession under the lease, to-wit, October 30, 1947, defendants received a letter from the commissioner of buildings of the City of Chicago,

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informing them that they must "discontinue use of the premises at 7006-8 S. State St. for wholesale chicken business as such premises are in a district zoned commercial," and stating that the building in its present condition is being maintained in violation of section 194A-11 of the building provisions of the Municipal Code of Chicago; that thereafter the City of Chicago instituted quasi criminal proceedings against defendants and that a hearing was had in the Municipal Court of Chicago, as a result of which defendants were found guilty of maintaining and controlling the premises in violation of section 194A-11 of the Municipal Code of Chicago; and that the court ordered the defendants to vacate the premises. The petition further alleges that shortly after the execution of the lease they made application for a license to permit them to operate the premises for the sale of "Eggs and poultry wholesale only," and that such application was rejected for the reason that the operation of the business was in violation of the ordinance hereinabove referred to.

The theory of defendants is that the lease is void as being in contravention of the Chicago Zoning Ordinance and that the petition sets forth an issue of fact constituting a good and meritorious defense.

An examination of the lease in question indicates that the property was leased by plaintiffs to defendants "to be occupied for Eggs & Poultry, Wholesale only." Defendants assert, and we agree, that this language means that defendants were to operate a business for the sale of eggs and poultry at wholesale. Defendants further assert that this use was prohibited by section 194A-11 of the



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zoning ordinance. A review of this section of the Code indicates that the operation of a "wholesale produce market" is a permitted use in a commercial district. ✓

"Wholesale produce" includes the sale of eggs and poultry (Kansas City v. Lorber, 64 Mo. App. 604). There therefore appears to be no prohibition under the ordinance to the selling, at wholesale, of eggs and poultry in such district provided that it is otherwise done in a legal manner.

Attention is directed to section 12 of chapter 194A, entitled "Manufacturing districts," disclosing that in a manufacturing district a permitted use is "(2) * * *

Poultry, game and small animal hatching, raising, breeding, killing, packing and storage for wholesale distribution."

Because the business which defendants sought to conduct might have been carried on in a manufacturing zoned district does not exclude its operation in a commercial district under section 11. ✓

That a proceeding was instituted in the Municipal Court and successfully prosecuted, based on a complaint that the building in its present condition was being maintained in violation of the zoning ordinance and ordering a discontinuance of the use of the premises for a "wholesale chicken business," does not establish defendants' burden of proving that the plaintiffs had leased the premises for a use prohibited by the zoning ordinance of the City of Chicago. ✓

We are of the opinion that the petitions fail to set forth any defense entitling defendants to vacate the premises in question, and the judgment orders of the Circuit Court of Cook County are affirmed. ✓

AFFIRMED.

Niemeyer and Feinberg, JJ., concur.

44850

MAX CHIZEWSKI and PAULINE CHIZEWSKI,
Appellees,

v.

LILLIAN POTTER, Administratrix of the
Estate of Hannah Barnett, Deceased,
and WILLIAM E. DECKER,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

33914-278²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed their complaint to review a decree of foreclosure of a junior mortgage upon property owned by plaintiffs. The foreclosure suit was filed October 30, 1945, and the decree by default entered June 12, 1946. A sale of the premises by the master, had on July 9, 1946, was approved by the court.

An answer was filed, and upon a hearing by the chancellor a decree was entered, vacating the decree of foreclosure and sale, and quashing the service of summons upon the plaintiffs in said cause, from which decree this appeal is prosecuted.

The question presented is whether plaintiffs made out a case sufficient to overcome the return of service by the sheriff, and the supporting testimony of the deputy who claimed to have served the writ.

From the allegations in the complaint and the proof in the record it appears that the summons in the foreclosure suit was returned by the sheriff, certifying that it was served on the defendants therein named (plaintiffs in this case) by leaving a copy thereof with each

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of the said defendants personally on the first day of November, 1945. The address of the defendants noted on the writ was 5312 South Harlem Avenue. The deputy testifying said that he went to that address, found that it was the wrong address, and that counsel for plaintiffs in the foreclosure suit later gave him another address, 5311 South Harlem Avenue, which again was the wrong address. The undisputed testimony of the defendants is they never lived at 5312 or 5311 but did live at 5309 South Harlem Avenue, which was the only house in the block.

It also is undisputed that on August 19, 1943, a judgment by confession was entered in the Municipal Court of Chicago upon the trust deed note involved in the foreclosure suit, and that as soon as these plaintiffs learned of the judgment entered against them by confession, they petitioned the Municipal Court to vacate the judgment, setting up a defense to the action. The judgment was vacated, and the suit thereafter was abandoned. Following the abandonment of the suit in the Municipal Court, defendants filed a foreclosure proceeding to foreclose the same junior mortgage on July 29, 1944, in which these plaintiffs were served as defendants. They filed an answer, setting up that they owed only \$185 on the note instead of the amount claimed, substantially the same defense they had set up in the Municipal Court to vacate the judgment by confession. While this foreclosure suit was pending, defendant brought the second foreclosure suit upon the same junior mortgage and note, in which the questioned service of summons was had. The first foreclosure suit referred to was not

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dismissed until 17 months after the second foreclosure suit was filed, and over 10 months after the decree of foreclosure in the second suit was entered. Plaintiffs did not discover the existence of the second foreclosure suit and the decree entered, or the sale had to satisfy the decree, until shortly before the instant action was brought. They discovered it from an opinion of title furnished by the Chicago Title and Trust Company in connection with their payment of the first mortgage against the premises and their desire to obtain a release thereof. Each of the plaintiffs testified that they were never served in the second foreclosure action, and that neither of them saw the bailiff serve any summons on the other.

The authorities are clear that a defendant may not, by his uncorroborated testimony, overcome a return of the sheriff of service of summons upon him. Marnik v. Cusack, 317 Ill. 362; Stasel v. American Home Security Corp. 362 Ill. 350.

In the instant case we think the circumstances disclosed sufficiently supported the claim of plaintiffs that they were never served with process. The deputy, who testified more than three years after the alleged service, and who presumably had served many writs in the interim, did not satisfactorily explain why, when he went to the first address noted on the summons and found it to be vacant, he did not inquire at the house directly across the street, where the plaintiffs were living, but instead chose to make another trip on another day following at another wrong number, and then decided to inquire at the only house in

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the block as to whether plaintiffs lived there.

It is significant that plaintiffs in the instant action consistently defended against the confession of judgment when they discovered that such a judgment had been entered, and the first foreclosure proceeding when they were actually served with a summons. It would seem most natural they would defend the second foreclosure proceeding had they been served with a summons and not allow the property to go to sale. Otherwise why on August 22, 1947, would they pay off the first mortgage? Such is not the reasonable and normal thing to expect, if plaintiffs had been served and knew of the second foreclosure suit. We, therefore, conclude that the chancellor was correct in holding that the evidence sufficiently established the claim of plaintiffs they had not been served with a summons in the second foreclosure proceeding.

We cannot say that the decree is against the manifest weight of the evidence. Miller v. Pettengill, 392 Ill. 117. The decree is affirmed.

AFFIRMED.

Tuohy, P. J., and Niemeyer, J., concur.

44877

HIRAM WALKER DISTRIBUTING CO.,)

Appellee,)

v.)

JOSEPH GIACONE and WINIFRED
GIACONE, doing business as
LINCOLN WINE & LIQUORS,)

On Appeal of WINIFRED GIACONE,)

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

339 I.A. 2791

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant Winifred Giaccone entered her special appearance and motion in the trial court to vacate the judgment by default against her and quash the return of the bailiff of service of summons upon her. The court denied the motion, from which this appeal is taken.

The return of the bailiff recited that he served the summons upon defendant "at his usual place of abode by delivering a copy thereof with a Praecipe and statement of claim and affidavit attached thereto, * * * to Jos. Giaccone (husband) a person of his family of the age of ten years or upwards and informing him of the contents thereof," and certifying that he sent a copy of the writ "by mail in a sealed envelope with the postage fully prepaid, addressed to said defendant Winifred Giaccone at her usual place of abode 217 E. 36th St. in the City of Chicago."

The affidavit filed by defendant with her motion to quash alleged that at the time of the supposed service of summons by delivering the same to defendant Joseph

Giacone, her husband, she was residing separate and apart from him, at 2557 West 79th Street, Chicago, and did not live with her husband or with any other member of the family at 534 South Milliard Avenue or at 217 East 36th Street, the place where the said summons allegedly was delivered and the address to which the summons was mailed; that neither of said latter addresses was her usual place of abode, but at said time her only place of abode was 2557 West 79th Street. The counter-affidavit filed by plaintiff admitted that defendant Winifred Giacone lived at 2557 West 79th Street, and there was no contradiction of the facts alleged in defendant's affidavit.

In that state of the record the court should have vacated the judgment entered by default and quashed the return. Such service, not at her usual place of abode, was not a compliance with the statute (Ill. Rev. Stat. 1947, Ch. 110, Par. 137, §13). Upon a similar state of facts we held in Scobbie v. Burch, 337 Ill. App. 656 (Abst.) the service should have been quashed and the judgment vacated. See also Mahler v. Segel, 333 Ill. App. 138. ✓

Accordingly, the order denying the motion is reversed, and the cause is remanded with directions to vacate the judgment and quash the service of summons.

REVERSED AND REMANDED
WITH DIRECTIONS.

TUOHY, P.J. AND NIEMEYER, J. CONCUR.

44957

LOUISE ARBUCKLE,
Appellee,

v.

LILLIAN SITEK and JOHN SITEK,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

339 I.A. 339²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action to recover trefle damages under the Federal Rent Control Law of June 30, 1947, as amended, for rent collected by defendants from the plaintiff in excess of the maximum rental fixed by the Office of Price Administration, Rent Control Division, for the premises located at 516-524 Diversey Parkway. There was a finding by the court in favor of plaintiff for the sum of \$1020 and \$100 attorney's fees, for which judgment was entered, and defendants appeal.

It appears from the evidence that the building in question contained 27 apartments with two basement stores. In 1942, the then owner of the premises registered the first floor apartment at No. 524 as housing accommodations, as required by the Federal Rent Control Act, and the ceiling rental was fixed at \$71 per month. In 1943, the then owner of the building remodeled the first floor apartment at No. 524 by cutting a door at the front and building a stairway from the sidewalk to the door to provide an entrance from the street. The defendants acquired title in July, 1944, and the plaintiff was then a tenant of the first floor apartment at No. 524 under a lease dated February 19, 1944, and expiring

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April 30, 1946, at a rental of \$75 monthly, the lease providing "Said premises to be used as ladies Beauty Parlor and dwelling." The defendants gave plaintiff new leases from May 1, 1946, to April 30, 1947, and May 1, 1947, to April 30, 1948, at a rental of \$100 per month, said latter leases containing the provision "Said premises shall be used as a Beauty Shop and Living Quarters (Combined)." There was no written lease after April 30, 1948, but the defendants collected rent for the same apartment at the rate of \$125 per month for the months of September, October and November. Though the defendants sold the premises on October 31, 1948, and the new owner took possession on November 1, 1948, yet the defendants collected the rent for November, as shown by a receipt in evidence, dated November 4, 1948, signed by defendant Lillian Sitek, covering the rent from November 1 to November 30, 1948.

Defendants purchased the property in 1944 with knowledge of said registration of the apartment in question. They made leases for rent in excess of the ceiling fixed by the Price Administrator. They continued to collect the excess rent throughout the period in question, and the evidence discloses that although they made efforts to get the apartment occupied by plaintiff decontrolled so that the Rent Control Act would not apply, they did not succeed in obtaining such an order from the federal authority. The excess rent collected above the ceiling fixed was a violation of the applicable section of the statute. Zaker v. Lapa, 332 Ill. App. 602. The continued collection of the

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excess rent, throughout the effort of defendants to have the apartment decontrolled, made out a prima facie case of wilful conduct permitting recovery of treble damages and attorney's fees under the statute. Zaker v. Lapa, supra.

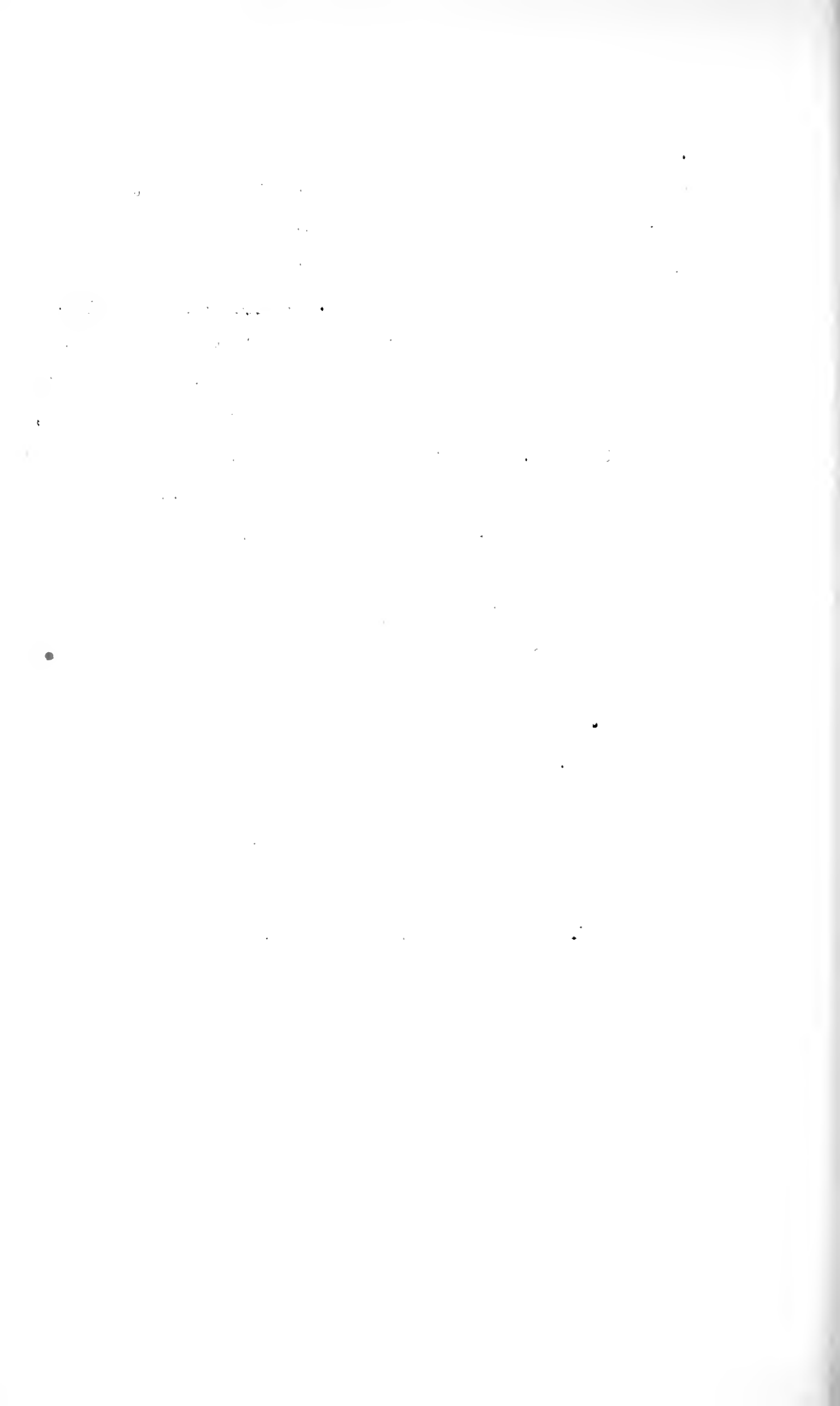
Defendants complain that the trial court was in error in computing the amount of the excess charge. The computation made by the court for the excess charge from January, 1948, through October, 1948, was \$29 per month for 8 months, totaling \$232, and \$54 for 2 months, totaling \$108, or a grand total of \$340. The treble recovery under the statute would allow total damages of \$1020, the amount found by the court. This did not include the month of November, 1948.

Complaint is made that the court refused to receive in evidence various exhibits offered by defendants. An examination of them makes it clear that they were irrelevant to the issue.

We think the judgment of the Municipal Court is correct, and accordingly it is affirmed.

AFFIRMED.

Tuchy, P. J., and Niemeyer, J., concur.



44812

RUTH SCHUESSLER,
Appellant,
v.
CHARLES J. WOLLIN,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment entered on a verdict in her forcible detainer action to recover possession of a retail store room and connecting 5-room apartment, classified by the Federal Housing Expediter as a residence unit. The principal question involved on the appeal is whether the evidence supports the verdict.

The premises involved constitute the first floor of a two story building with two apartments on the second floor. At the time defendant became a tenant the property was held by a trustee for the benefit of plaintiff, her father and her brother. The latter occupied one of the flats on the second floor. Judgment for possession as to the other second floor flat had been obtained to provide living quarters for the father, but the tenant had not been dispossessed. Prior to the institution of this suit the father transferred his interest to plaintiff and her brother, and a deed from the trustee to them was executed and delivered. Originally defendant paid \$55 a month for the premises occupied by himself and his family. At the time when the Rent Control Act had lapsed a forcible

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detainer suit was instituted by the father for possession of the store room, and as a result of negotiations defendant entered into a one year lease at the monthly rental of \$85. Upon the termination of this lease he became a month to month tenant. Thereafter defendant brought an action under the federal rent control act for trebble damages because of the increased rental imposed upon him. The present suit, brought in the name of the plaintiff, one of the joint owners of the property, is based upon her claim of a desire to occupy the premises for herself and family, consisting of a child in its second year, a child in esse and her husband, and the intention to use the store room as a place of business for the husband, a dental technician. She testified to facts supporting her claim of good faith in wanting possession for living quarters. This action is directed by plaintiff's father. Defendant presented testimony of an offer to permit him to remain in the premises on the payment of \$125 per month. Plaintiff's witnesses deny this offer and say that the statement made was that plaintiff would be obliged to pay \$125 per month to get similar quarters. Objection is made to the reception of this testimony. We consider it competent upon the question of plaintiff's good faith. Nofree v. Leonard, 327 Ill. App. 143. The facts and circumstances in evidence tend to support defendant's claim of want of good faith on the part of plaintiff and an effort to secure a higher rental. The jury was the judge of the truth of the testimony

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offered and whether or not plaintiff was acting in good faith. The verdict is not against the manifest weight of the evidence and must be sustained.

The judgment is affirmed.

AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

44951

In the Matter of the Estate of)
Sarah Hart, Deceased.)

JOHN HART,

Appellant,

v.

CHARLES J. REILLY and MARIE
MANZKE, Executors of the Estate)
of Sarah Hart, Deceased.)
Appellees.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioner appeals from an order of the Circuit court on appeal from the Probate court denying his claim against the estate of his deceased wife for reimbursement for money expended by him in the payment of a bill for undertaking services and for the burial of his deceased wife, and money expended for physician and surgeon fees, hospital and nurses' bills rendered the deceased in her last illness and paid by petitioner after her death.

The deceased died testate January 16, 1947. On July 9, 1936 she obtained a decree for separate maintenance in which petitioner was directed to make certain payments in respect to the operation of and the incumbrances upon certain real estate owned in joint tenancy and to make certain semi-monthly payments to deceased until ^{the} further order of the court. This order was not vacated or altered by any subsequent court action. However, evidence offered on

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behalf of respondents is sufficient to justify a finding that subsequent to the entry of the order the parties resumed their marital relations and lived together and were living together at the time of decedent's death. This resumption of the marital relation abrogated the decree. Van Dolman v. Van Dolman, 378 Ill. 98, 104; Ahlstrand v. Ahlstrand, 329 Ill. App. 242 (abst.). In 1944 the deceased executed a will, which was admitted to probate in the Probate court of Cook county, by the first paragraph of which she directed, "In the event my husband, John Hart, shall survive me ~~and~~ and does not do so, I order and direct that my executrix hereinafter named pay all my just debts and funeral expenses as soon after my death as conveniently may be." On April 25, 1947 petitioner filed his renunciation under the will and **thereafter** filed his claim for reimbursement for the moneys expended as above stated. The expenditure of the money for the purposes claimed is admitted. The primary liability of a husband, not living separate and apart from his wife under a decree of separate maintenance, for the expenses involved herein is well established. Gustin v. Bryden, 205 Ill. App. 204; Weinstein v. Lotsoff, 232 Ill. App. 566. He can not compel reimbursement by the estate.

The order appealed from is affirmed.

AFFIRMED.

Tuohy, P. J. and Feinberg, J., concur.

44973

RUTH I. OTT LEICHTFELD, Individually, and as ~~Administrator~~ of the Estate of William Paul Leichtfeld, Deceased,

Appellant,

v.

EUGENE E. DORNBAUGH, Executor of Estate of Anna Leichtfeld, Deceased,

Appellee.

APPEAL FROM CIRCUIT COURT COOK COUNTY

339 I.A. 281

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered on June 17, 1949 in which the court refused to vacate an order dismissing said cause entered May 19, 1949.

Plaintiff filed various complaints and petitions, which were dismissed or denied by the court. From the various pleadings, petitions and affidavits it appears that plaintiff is the widow of and administratrix of the estate of William Paul Leichtfeld, who died in 1934; that decedent was then a partner with his father, W. F. Leichtfeld, in a retail haberdashery; that shortly before decedent's death plaintiff filed suit for divorce, and in order to defeat her claim for support, etc., decedent's interest in the haberdashery was fraudulently transferred to his father; because of the death of decedent the divorce suit was dismissed. Plaintiff at various times employed lawyers to search for assets belonging to decedent's estate, but none were discovered. The father died about 8 years after the death of his son, and his wife, Anna Leichtfeld, died in 1947. Thereafter letters of administration were issued

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in decedent's estate and this litigation instituted to recover from the estate of Anna Leichtfeld property claimed to have been the property of her son and to have been transmitted to her through her deceased husband as the result of the alleged fraudulent transactions in 1934 in the lifetime of her son.

Whatever right of action plaintiff may have had, accrued on the death of her husband in 1934. The alleged partnership **between** him and his father was dissolved by his death (sec. 31, Partnership, Ill. Rev. Stat. 1949, chap. 106 1/2) and a right to an account of his interest against the father as surviving partner accrued to the legal representatives of decedent. (Sec. 43.). This action should have been brought within 5 years. (Sec. 15, Limitations, Ill. Rev. Stat. 1949, chap. 83, par. 16.) Plaintiff having neglected the institution of suit for more than 13 years, the court properly struck the petition and dismissed the suit.

The judgment is affirmed.

AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

Abstract

Gen. No. 10349.

Agenda No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

FEBRUARY TERM, A. D. 1949.

339 I.A. 826¹

DOROTHEA L. BARTZEN,)	
Plaintiff (Petitioner),)	
vs.	)	Petition for Leave to
	)	Appeal from the Cir-
JOSEPH RAYMOND BARTZEN,	)	cuit Court of Lake
Defendant (Respondent).	)	County.

WOLFE,-- P. J.

In December 1947, Dorothea L. Bartzen filed a complaint in the Circuit Court of Lake County, against her husband, Joseph Raymond Bartzen for a divorce. In her petition she alleges that they were married in August 1924, and since that time she was a true and affectionate wife; that four children were born to them; two of them are now of age and two are minors, the younger an infant of fifteen months of age; that she has the care and custody of said minor children.

The complaint alleges that the defendant, Joseph Raymond Bartzen, had been guilty of extreme and repeated cruelty towards her; that he struck the plaintiff on August 25, 1945, and inflicted serious injuries upon her; that he violently assaulted the plaintiff on October 1, 1945, and again on October 9, 1947, and on December 21, 1947; that on account of the mistreatment of the defendant, the plaintiff was compelled to leave her husband on December 4, 1947. She asked for the care and custody of David Bartzen, the son, seventeen years old, and Juliette Bartzen, age fifteen months.

IN THE

APPELLATE COURT OF MISSISSIPPI

SIXTH DISTRICT.

WESTERN TERM, A. D. 1947.

DOROTHY L. BARTON,
Plaintiff (Petitioner),
vs.
JOSEPH RAYMOND BARTON,
Defendant (Respondent).

WOLFE,-- P. 2.

In December 1947, Plaintiff, Dorothy L. Barton,

in the Circuit Court of the County of Harrison, State of Mississippi,

Raymond Barton for a divorce from and dissolution of the marriage between

they were married in August 1947, and Plaintiff, Dorothy L. Barton,

true and affectionate wife of Defendant, Joseph Raymond Barton, born

two of them are now of and are living in the State of Mississippi, and Plaintiff

infant of fifteen months of age, Plaintiff, Dorothy L. Barton, and child

of said minor children.

The complaint alleges that because of the conduct of Defendant,

Barton, had been guilty of adultery and had been guilty of

her; that he struck the Plaintiff on August 22, 1947, and inflicted

serious injuries upon her; that he violently assaulted the Plaintiff

on October 1, 1947, and again on October 2, 1947, and on November

21, 1947; that on account of the treatment of the defendant,

the Plaintiff was compelled to leave her husband on December 1,

1947. She asked for the care and custody of David Barton, the

son, seventeen years old, and infant Barton, the fifteen months

She prays for a divorce and also an accounting of the joint tenancy of certain property.

The defendant filed his answer in which he admits the jurisdictional requirements, the marriage and the birth of the children and their ages. He denies that the plaintiff is a fit and proper person to have the care and custody of the minor children, and says that David Bartzen is living with him. The answer further says that the plaintiff wrongfully and without just cause on December 4, 1947, left, and deserted the defendant; that the defendant has at all times been ready, willing and able to support Juliette Bartzen, the youngest child at home. He denies the allegations and charge of cruelty. He alleges he has treated his wife as a true, dutiful and affectionate husband, and has always provided her with funds within the limits of his income and financial ability. The plaintiff filed a reply to the defendant's answer.

At the October Term, 1948, of the Circuit Court the case came on for a hearing before the Court without a jury. After hearing evidence of both for the plaintiff and the defendant, the Court entered a decree finding the issues against the plaintiff and in favor of the defendant, and dismissed the bill for want of equity.

It will be observed that the defendant did not file a cross complaint, but relied wholly upon his answer to the complaint, and did not ask for any affirmative relief. In the decree the Court further finds that Dorothea L. Bartzen wilfully and without just cause deserted the defendant, Joseph Raymond Bartzen; that she is not a fit and proper person to have the care and custody of the minor children, and that the husband, Joseph Raymond Bartzen, is the proper person to have the care and custody of said minor

children. In a suit for a divorce where there are minor children involved, and the bill is dismissed for want of equity, the Court is without power to make any ruling in regard to the custody of the minor children. Thomas vs. Thomas, 250 Ill. Page 354. We think the decree is further erroneous in making findings of fact, especially that Dorothea L. Bartzen had wilfully and without just cause deserted her husband. It is incumbent upon her to prove her case, and if she failed to do so, the only order of Court that was necessary was to dismiss the complaint for want of equity without any finding of fact whatsoever.

Dorothea L. Bartzen testified on her own behalf, and she swore to each and everyone of the acts of cruelty charged in her complaint. David Bartzen, a son, (whom the defendant says is living with him,) corroborated some of the acts of cruelty. James Raymond Bartzen, another son, corroborated several acts of cruelty of the father toward the mother. Adelle Lloyd, the mother of the plaintiff, corroborated one act of cruelty. Joann Zander corroborated several acts of cruelty of her father toward the mother. The defendant denied all acts of cruelty on his part toward the wife. He had witnesses to testify that they had seen the parties out together, and that both, the plaintiff and defendant had perhaps drunk too many highballs and there were some harsh words from the plaintiff to the defendant, but there is no word of testimony that she ever struck him, or threatened to strike him.

In answer to the question "what has Dorothea's conduct been toward you during the twenty-three years you have been married to her?" Defendant's answer: "She has always conducted herself as a wife ordinarily conducted herself. We have known each other since we have been about eight years old. I suppose she did as any other wife." She did her duties as any other wife would.

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She always took good care of the children. The children were healthy. They were all well-dressed and well-fed."

It is with great reluctance that an Appellate Court will reverse the findings of a trial court upon questions of fact, but under the evidence as disclosed in this record, it is our conclusion that the trial court erred in dismissing the plaintiff's bill for want of equity, but should have granted her a divorce, as prayed for in her complaint. The judgment of the trial court is reversed and the cause remanded.

Judgment reversed and cause remanded.

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It is with great reluctance that an appellate Court will reverse the findings of a trial court upon questions of fact, but under the evidence as disclosed in this record, it is our conclusion that the trial court erred in dismissing the plaintiff's bill for want of equity, and we have granted her a divorce, as prayed for in her complaint. The judgment of the trial court is reversed and the case remanded.

Judgment reversed and case remanded.

In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, A.D. 1949.

~~DONALD~~
DONALD F. ROGERS,

Plaintiff,
Counter-defendant, (Appellant),

vs.

IRENE C. ENZINGER,

Defendant,
Counter-plaintiff, (Appellee).

Appeal From
County Court,
Lake County.

3391.A. 376²

Dove, J.

Donald F. Rogers, appellant, filed this action in the County Court of Lake County against appellee, Irene C. Enzinger, to recover the unpaid balance due him under a written contract wherein he was employed by appellee to remove certain trees from a thirty-five acre wooded estate owned by her, to prune other trees located thereon, to remove weed growths therefrom, to cut back certain shrubby and to conduct protective burning of the main lawn of her premises together with other work thereon which was minor in character. The work was done in the month of October, 1946, and the agreed sum to be paid the plaintiff for his services was One Thousand Three Dollars.

The complaint alleged that the plaintiff had performed all of the work so agreed upon in a good and workmanlike manner and had been paid on his said contract the sum of Seven Hundred Fifty Dollars and that there was a balance due him of Two Hundred Fifty-three Dollars, for which he demanded judgment. The Answer admitted the execution of the written contract but denied that the

In The

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1949.

Appellant from
County Court,
Lake County.

RONALD T. ROGERS,

Plaintiff,

Counter-Defendant, (Appellee).

vs.

IRVING C. ENZINGER,

Defendant,

Counter-Plaintiff, (Appellant).

Dove, J.

Ronald T. Rogers, Appellant, filed this action in the

County Court of Lake County against appellee, Irving C. Enzinger,

to recover the unpaid balance due him under a written contract

wherein he was employed by appellee to remove certain trees from

a thirty-five acre wooded estate owned by him, to remove other

trees located thereon, to remove and haul away therefrom, to cut

back certain shrubbery and to conduct protective burning of the

lawn of her premises together with other work thereon which was

minor in character. The work was done in the month of October,

1948, and the agreed sum to be paid the plaintiff for his services

was One Thousand Three Dollars.

The complaint alleged that the plaintiff had performed

all of the work as agreed upon in a good and workmanlike manner

and had been paid on his said contract the sum of Seven Hundred

Fifty Dollars and that there was a balance due him of Two Hundred

Fifty-three Dollars, for which he demanded judgment. The Answer

admitted the execution of the written contract but denied that the

work had been done in a good and workmanlike manner and ~~but~~ alleged that, in doing the work, valuable plantings, trees and other property of the defendant were killed or damaged. The Answer denied that the plaintiff was entitled to the balance due under the contract.

The defendant also filed a counterclaim in which she set up the written contract and then alleged that appellant was guilty of certain specific charges of negligence and carelessness in the performance of his contract, the principal charge of negligence and carelessness relied upon being damage to certain trees on her property as a result of the alleged negligent manner in which the appellant conducted the protective burning agreed upon in the contract. She demanded judgment against appellant in the sum of Two Thousand Dollars. Appellant answered, denying the allegations of negligence and carelessness in the performance of his duties under the contract.

The issues thus made were submitted to the Court, ~~trial by jury was waived, and the matter was heard for determination,~~ a jury having been waived, resulting in a finding that the plaintiff had established the allegations of his complaint so far as the balance due under the written contract was concerned and that such balance should be credited, as an offset, against the damages which the Court found were due defendant on her counterclaim. The Court further found that defendant had sustained damages to her property in the sum of Twelve Hundred Fifty Dollars against which the balance due appellant on his contract in the amount of Two Hundred Fifty-three Dollars should be credited, leaving Nine Hundred Ninety-seven Dollars due defendant for which sum judgment was rendered and plaintiff prosecutes this appeal to reverse that judgment.

At the outset it is necessary to determine a question relating to the pleadings. The appellant contends that appellee's cause of action is based on negligence and since there was no allegation in the counterclaim of due care on the part of appellee,

and no proof of due care made upon the hearing, the counterclaim failed to state a cause of action and the judgment of the trial court did not cure this deficiency. Appellee's position is that the proceeding is ex contractu and that under her theory of the case the pleadings properly stated a cause of action without an allegation of due care on her part. The difference between proceedings ex contractu and ex delicto is stated in Schneider vs. Ft. Dearborn Casualty Underwriters, 258 Ill. App. 58 at page 63 where the court says: "To determine the form of redress, whether ex contractu or ex delicto, it is necessary to ascertain the source or origin of the duty which it is alleged has been breached. 38 Cyc. 426. The relation of the parties being solely contractual, their duties arise out of the insurance policy and such other duties which the law imposes upon them because of such relation. We think the general rule applicable to the relation of the parties to this action is well stated in the case of Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 240 Fed. 573. In this case the U. S. Circuit Court of Appeals say: 'It is a well recognized rule that, where the only relation between the parties is contractual, the liability of one to the other, in an action of tort for negligence, must arise out of some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done, and that the mere breach of an executory contract, where there is no general duty, is not the basis of such an action.' This general rule is recognized in the case of Nevin V. Pullman Palace Car Co., 106 Ill. 222,223, where it is held that the general principle is, that where the duty for the breach of which the action is brought would not be implied by law by reason of the relation of the parties, whether such relation arose out of the contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract and not in tort."

and no proof of due care was upon the defendant's counterclaim
failed to state a cause of action and the judgment of the trial
court did not cure this defect. Defendant's motion is for
the proceedings in the case to be set aside and the case to be
the pleadings properly stated a cause of action without an alle-
tion of due care on her part. The difference between the
ex contractu and on behalf of a third party is not a
Gaudy University, 289 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 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We do not think that the result in this case will be any different irrespective of whether the counterclaim be regarded as based on contract or on tort. In our opinion, there were sufficient facts alleged in the pleadings to justify the inference of due care on the part of the appellee. For instance, it is alleged in the complaint that the appellant had been engaged in tree surgery and landscaping work in the City of Lake Forest, Illinois, for many years, which allegation was admitted by appellee in her pleadings. Further the proof showed that he had been engaged in said business in the City of Lake Forest for twenty-six years. When appellee hired a man with such experience to do the work contracted for, a well-founded inference of due care on her part for the protection of her property arises. It also appears that she employed a caretaker to oversee the same and in our opinion the proof shows due care on her part and any failure to allege the same is cured by the judgment. It is also to be noted that appellant made no effort to test the sufficiency of the counterclaim by a motion to dismiss, and having failed to do so, it is too late, in the absence of a total failure to either state a cause of action or prove one, to raise this point for the first time in this Court.

It is insisted by counsel for appellant that the judgment of the trial Court is not sustained by the evidence and is contrary to the manifest weight of the evidence. Inasmuch as this case must be reversed because of the failure to follow the proper rule relating to the measure of damages, it is not necessary for us to set out in detail the evidence produced at the hearing nor to comment on the weight of the same. The Record shows that appellee called Roy F. Clavey as a witness, and he testified that at the time of the trial he was 41 years of age and had been engaged in the nursery business in the vicinity of appellee's property for the past twenty-four years. He

we do not think that this result in this case will be any
different irrespective of whether the same result be reached by
based on conduct on one hand. In the opinion, there were different
facts alleged in the petition as to the nature of the case
on the part of the appellant. For instance, it is alleged in the
complaint that the respondent had been engaged in some business and
landed in the way in which it is alleged, but that, for many years
which allegation was made in the petition, the respondent, in the
the proof showed that the respondent was not engaged in the
city of New York, but that he was engaged in the business of
man with some other person, and that the respondent was not engaged
influence of the respondent, but that the respondent was not engaged
arises. It also appears that the respondent was not engaged in
and in our opinion the proof shows that the respondent was not engaged
failure to allege the same in the petition, but that the respondent
be that the respondent was not engaged in the business of
the respondent by a person who was not engaged in the business of
it is too late, in the opinion of the court, to allow the respondent
cause of action or defense, but that the respondent was not engaged
in this case.

It is further alleged that the respondent was not engaged in the business of
of the trial court is not satisfied by the evidence and the finding
to the nearest witness of the respondent. The respondent is not engaged
be reversed because of the failure to follow the proper rules of
in the measure of the respondent, but that the respondent was not engaged
in detail the evidence produced at the hearing was not sufficient to
weight of the same. The respondent's trial appeal is called for
as a witness, and he testified that at the time of the trial he was
41 years of age and had been engaged in the same business in the
vicinity of appellant's property for two years and four months. He

stated that he examined the premises of the appellee in about the month of May, 1948, at which time he found four large American Ash trees, fourteen inches in diameter, and one, eighteen inches in diameter, each being approximately fifty feet tall, and one large Catalpa tree, which were dead, and he expressed his opinion that they had died from burning and that they were located in the area where the protective burning by the appellant had been done.

Mr. Clavey was then asked this question, "In your experience as a nursery man, what is your opinion of the value of a fourteen-inch American Ash tree in a live and healthy condition in the vicinity and on that place in Lake County in September, 1946?" Over counsel's objection, the witness was permitted to answer: "Three Hundred Seventy-five Dollars each." He was asked a similar question with regard to the other American Ash Tree, eighteen inches in diameter, and the Catalpa tree and over counsel's objection, gave it as his opinion that the American Ash tree's value was Five Hundred Twenty-five Dollars and the Catalpa tree's value was Four Hundred Fifty Dollars in September, 1946. This was all the evidence introduced by either party on the question of damages.

Collins v. Illinois Central R.R. Co., 161 Ill. App. 95, was an action to recover damages resulting to the plaintiff from a fire originating on the right of way of the defendant and spreading to the lands of the plaintiff where his fence, meadow and fruit trees were burned. Upon the trial evidence as to the value of the trees was admitted and in the course of its opinion the Court, on Page 96, said: "The true measure of damages in a case of this sort is the difference in the value of the land before and after the fire. L. E. & St. L. Con. R.R. Co. v. Spencer, 149 Ill. 97; Same, 47 Ill. App. 503; I.C.R.R. Co v. Almon, 100 Ill. App. 530; C. & A. R.R. v. Davis, 74 Ill. App. 595. We are aware a different rule obtains in some

jurisdictions where it has been held that the measure of damages for negligent destruction of and injury to fruit trees is the value of those destroyed and the difference in value of those injured before and after the injury, and not the difference in the value of the land on which they stood before and after the injury, but this is not the rule in this State."

In the annotation following the report of the case of Jefferson Lumber Company v. Berry, an Alabama case reported in 161 A.L.R. 544, it is said (P.598) "By the great weight of authority the proper measure of damage for the destruction of or injury to ornamental or shade trees and shrubs is the difference in the value of the property immediately before and immediately after the act complained of, or the amount of depreciation." Dwight v. Elmore, Cortland & Northern R. Co., a case decided by the Court of Appeals of New York and reported in 15 L.R.A. 612, held that the correct measure of damages for destruction by fire of fruit trees is the difference between the value of the realty before and after such destruction, and in the course of its opinion the Court, at Page 613, said: "The same rule prevails as to shade trees, which, although, fully developed, may add a further value to the freehold for ornamental purposes or in furnishing shade to stock. Nixon v. Stillwell, 23 N.Y. S.R. 474, and cases cited supra. The current of authority is to the effect that fruit trees and ornamental or growing trees are subject to the same rule."

The evidence in this record discloses that there ^{were} ninety-nine trees on the thirty-five acre woodland estate owned by appellee and which is the subject of this controversy. The testimony of the witness on the question of damages is in no way correlated to the entire premises, as it should be. The total damages sustained by

appellee according to Mr. Clavey's testimony was Twenty-four Hundred Seventy-five Dollars, which sum represented the value of the six trees about which he was asked to give his opinion. The trial court found that appellee sustained damages in the amount of Twelve Hundred Fifty Dollars against which a credit of Two Hundred Fifty-three Dollars due appellant under his contract was allowed. There is no evidence to sustain this finding. The judgment based thereon must, ~~thereon must~~ therefore, be reversed and the cause is remanded to the County Court for a new trial.

Judgment reversed and cause remanded.

Abstract

Gen. No. 10364.

Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A. D. 1949.

OTIS L. TANNER,
Plaintiff-Appellee,
vs.
CHARLES M. PALMER,
Defendant-Appellant.

3391A.377
Appeal from
Circuit Court,
McHenry County.

PER CURIAM

On June 26, 1941, the plaintiff, Otis L. Tanner, and his hired man, Wayne Robertson, were working in a hayfield adjacent to a public road. The defendant, Charles M. Palmer, and a nephew and another young lad about sixteen years of age, were in Palmer's automobile driving towards Palmer's farm. Palmer stopped his car and got out and walked towards where Tanner was working. Tanner quit his work and started towards Palmer. Palmer told Tanner that he wanted him to keep his pigs out of his field. Tanner replied that his pigs were not, or had not been in Palmer's field. He asked Palmer to stop to see his dad, as he wanted to see him anyway. Palmer said, "I don't have to run after your father, I don't have to take orders from him," then, "God damn him and you too." Palmer then got into his own car, drove down the road a short way to a lane leading back to some farm building fifteen or twenty rods from the road, which was on his own premises. Before Palmer left, Tanner said

Gen. No. 100-7-10

IN THE

U.S. DISTRICT COURT OF THE DISTRICT OF

SOUTHERN DISTRICT

OF NEW YORK

IN SENATE
JANUARY 10, 1901
RECORDED
INDEXED

U.S. DISTRICT COURT
SOUTHERN DISTRICT

NY

U.S. DISTRICT COURT
SOUTHERN DISTRICT

IN SENATE

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to Palmer, "Hey, wait. That isn't so. Wait a minute. Come back here," but Palmer paid no attention and drove on in his car up to his own building. After Palmer left, Tanner went to his father's home, which was a short distance from where he was working, got his car and came back to where Wayne Robertson was working, and told him to get into the automobile and bring his pitchfork, he was going over to have Palmer, (who is an uncle by marriage of Tanner,) apologize. Robertson got into the car with his pitchfork, then Tanner drove the car into the premises up to the place where Palmer and the two boys were doing some work. From here on, what happened over at the Palmer place is not clear from the evidence, but Palmer struck Tanner on the head with a hammer, and badly injured him.

On July 21, 1942, Tanner brought suit against Palmer in the Circuit Court of McHenry County, for the damage he sustained by reason of Palmer hitting him with the hammer. The case was tried before a jury who found the issues in favor of the plaintiff, and assessed his damages at twenty-two thousand dollars. On motion of the defendant, this verdict was set aside, because as the Court stated there was insufficient evidence to sustain the verdict, and a new trial was ordered. The case was again tried in September 1948, before a jury, and a verdict rendered in favor of the plaintiff for twenty-nine thousand dollars. The Court overruled the motion for a new trial, entered judgment on the verdict, and it is from this judgment that an appeal has been perfected to this Court.

It is first insisted that the Court admitted improper evidence on behalf of the plaintiff. Especially as to Doctor Hawkinson, who qualified as a practicing physician and who limits

[illegible]

his work to neurology and psychiatry. Doctor Hawkinson testified as an expert that he had examined the plaintiff, Otis Tanner, and from his examination, he was permitted over the defendant's objection, to testify not only to things he observed objectively, but also to testify to subjective matters. We have read Dr. Hawkinson's evidence as abstracted, and there are several instances where we think that the doctor testified to subjective symptoms, and based his opinion on certain conclusions that he reached from the history of the case, and what the plaintiff himself had told him, and it was error to admit that part of the doctor's testimony.

The appellant criticized practically every instruction that the Court gave on behalf of the plaintiff, and in some of them we think the criticism is well taken especially those that relate to the law of self-defense. It is the law that the plaintiff must prove his case by a preponderance of the evidence, and in a great many instances this fact in the instruction is omitted. In order to pass upon the instruction intelligently in regard to self-defense, a statement of what occurred just before Mr. Palmer hit Tanner with the hammer, is necessary.

It is undisputed that Tanner took Wayne Robertson in his car over to the Palmer premises with the express purpose of getting him to apologize for what he says, were the names that Palmer had called Tanner's father. The only thing that Tanner testified Palmer said is, "God damn him and you too." Tanner told Robertson to take his pitchfork along. They went over and Tanner got out of the car and walked up to where Palmer was working. The evidence varies as to just what happened at this time, but taking Tanner's version of what transpired as he walked up to where Uncle Charlie was standing in the barn door, and he said to his uncle, "Say you said some pretty strong things to me down there in the road, and I want you to apologize for them." At this time he had gotten pretty close to his Uncle Charlie. Palmer came out of the barn door and said, "You young fool, what

his work to neurology and psychiatry. Doctor Lawson testified as an expert that he had examined the plaintiff, John Turner, and

from his examination, he was permitted to say that the defendant's objection, to testify, not only to things he observed objectively,

but also to testify to subjective matters. He said that the defendant

in his evidence was contradicted, and that there were several instances

where we think that the doctor testified to as just the symptoms,

and based his opinion on certain facts known to him, as reached from

the history of the case, and what the plaintiff himself had told

him, and it was error to admit that kind of a doctor's testimony.

The appellant testified that the doctor's testimony

that the doctor gave a result of "schizophrenia" and "paranoia"

them we think the evidence is well established, and that the

plaintiff to the fact of self-defense. To his mind, that the plaintiff

did not prove his case, and that the evidence is not sufficient, and

in a grant jury verdict, that the fact is the defendant is entitled

In order to prove his case, the defendant must prove that he

self-defense, and that the evidence is not sufficient to prove that

his Turner with evidence, as needed.

It is unnecessary to say that the defendant is

the car over to the defendant's car, and the evidence is not

getting him to say that he saw the names that

Turner had said to the defendant's car, and the evidence is not

testified that Turner said to him, "You are a fool," Turner

told Robertson to take his car, and the evidence is not

Turner got out of the car, and walked up to the car, and

working. The evidence was not sufficient to prove that

time, but taking Turner's version of what happened as he walked

up to where Uncle Charlie was standing in the back door, and he

said to his uncle, "Say you said some pretty strong things to me

down there in the road, and I want you to apologize for that."

At this time he had gotten pretty close to his Uncle Charlie.

Palmer came out of the back door and said, "You young fool, what

are you doing here?" "Are you looking for trouble or something like that?" Tanner kept right on walking towards him and said, "No, I want you to apologize for what you said down at the road," and he walked within about five or six feet of his Uncle Charlie and Palmer said, "I haven't said anything I have to apologize for," and Tanner replied, "Yes, you did, you called my dad something in pretty strong words." There was some argument then over a dog, as to whether Robertson had killed Palmer's dog, or whether Palmer's dog had killed some of Tanner's father's sheep. Tanner says Palmer was very angry, but he himself was not angry at all, just peeved by what Palmer had said about his father; that Palmer turned around and went to an old sled and picked up a claw hammer; that he had it in his right hand, brandished it and walked down towards Tanner and said, "Now, you God damned son of a bitch, I told you to get off of my land, get off, or I will kill you." Palmer denies threatening to kill Tanner, but does admit that he told Tanner to get off of his place. Tanner claims he replied, "Don't you dare use that hammer;" that Tanner also says that Palmer shook the hammer and Tanner just stood there with his hands down by his side; that Palmer repeated his order three times, and called him the vile name, and told him to get off of the premises. Tanner then said, "If you feel that way, take off your glasses and go down to the road and call my dad that again and make a stand." Tanner claims that after this remark, Palmer hit him with his left fist three times in the face and shoved him backwards. Palmer claims he did not strike him at all, but merely gave him a shove and he went backwards, but did not fall. After the striking or shoving Tanner turned to Robertson and said, "Wayne, what shall we do with this man?" "He won't apologize, or he won't go out to the road like a man and make a stand."

At this point it is undisputed that Wayne Robertson got out of the car with the three-tined pitchfork in his hands and advanced towards where Palmer and Tanner were standing, and when he was within a distance of twenty feet or thereabouts, Palmer hit Tanner on the head with a hammer. The evidence is conflicting as to just what Robertson did with the pitchfork. Palmer and the two boys claim that Robertson was approaching Mr. Palmer at the time Palmer struck Tanner with a hammer. Robertson says he stopped and stuck the fork in the ground, and was not advancing towards Palmer at the time Tanner was struck. Tanner testified that at no time was he angry, he was just merely peevish because Palmer had called his father some names.

The only defense relied upon by the defendant was that of self-defense; that he was on his own property and was not causing any disturbance at all, and Tanner and Robertson came over with the express purpose of making Palmer apologize, or have a fight. In this state of the record, the instruction in regard to self-defense should be accurate. The law as stated relative to self-defense in the case of the People vs. Durand, 307 Ill. at Page 621, we think is very applicable to the case at bar. There is no question that this trouble in the first place was not sought by the defendant, Palmer. He was on his own land and attending to his own business when the plaintiff and his man came over looking for trouble. In the Durand case it is stated: "The old doctrine of the common law that the right of self-defense is denied to a man until he has exhausted every effort to escape is not now the law of this State, but the law is that where a person is in a place where he has a lawful right to be and is unlawfully assaulted by another or put in apparent danger of his life or great bodily harm, he need not attempt to escape but may lawfully stand his ground and meet force with force, even to the taking of his assailant's life, if necessary

At this point it is undisputed that Wayne Robertson got out of the car with the three-tined pitchfork in his hands and advanced towards where Palmer and Tanner were standing, and when he was within a distance of twenty feet or thereabouts, Palmer hit Tanner on the head with a hammer. The evidence is conflicting as to just what Robertson did with the pitchfork. Palmer and the two boys claim that Robertson was apprehended by Palmer at the time Palmer struck Tanner with a hammer. Robertson says he stopped and struck the fork in the ground, and was not returning towards Palmer at the time Tanner was struck. Tanner testified that at no time was he struck, he was just a witness. Palmer had called his father and mother.

The only defense is that the evidence is conflicting as to whether or not self-defense was a factor. It was claimed that Robertson was carrying any disturbance at all, and that he was over with the express purpose of hitting Palmer. Palmer, on the other hand, in this regard, is a witness, and he has testified in regard to self-defense. He has testified that he was in a relative to self-defense, and he has testified that he was in a 307 Ill. at Page 691, he testified that he was in a place at bar. There is no question that this evidence is the thing place was not sought by the defendant, but he was in his own hands and acted up to his own defense. The defendant and his own some even looking for trouble. In the Federal case it is stated: "The old doctrine of the common law that the right of self-defense is denied to a man who has been provoked every effort to escape is now the law of this State, and the law is that where a person is in a place where he has a lawful right to be and is unlawfully assaulted by another or is in danger of his life or great bodily harm, he need not attempt to escape but may in doing stand his ground and meet force with force, even to the taking of his assailant's life, if necessary

or apparently necessary to save his own life or to prevent great bodily harm." It seems to us that there is no question that Tanner intended to assault his uncle if he did not apologize. If not, why did he ask his uncle to take off his glasses, or why did he ask him to go down in the road and make a stand down there, or to tell Robertson to take his pitchfork along?

Each of these instances was an invitation to fight. For Tanner to say he was not angry after his uncle had called him the vile names three times, as he says Palmer did, hardly seems reasonable, especially after he had asked his uncle to take off his glasses and challenged him to go down the road and fight. It appears to us from this evidence that Tanner was the aggressor throughout this unfortunate affray.

Under the defense, as interposed in this case practically every one of the instructions given on behalf of the plaintiff in regard to self-defense is peremptory, as they state under such circumstances self-defense is not available to the defendant.

Plaintiff's instruction No. 22 tells the jury that in considering the amount of their verdict, if they find the issues in favor of the plaintiff, they may take into consideration, "To what extent, if any, he may have endured physical and mental suffering." In this suit he cannot recover damages for mental suffering. There is another reason why this instruction is erroneous. The complaint does not charge that the plaintiff suffered any, mentally.

It is argued that the jury should consider the instructions as a series or a whole, but where an instruction is peremptory, or directs a verdict, it cannot be cured by other instructions. In the case of *The People vs. Allen*, 378 Ill.

Page 169, it is stated: "It is further claimed that the instructions, as a series, correctly state the law, and, therefore, any error in the giving of the erroneous instructions is cured. An incorrect instruction in a case where the evidence is conflicting is not cured by a correct one, for the very adequate reason it is impossible to determine which instruction the jury followed."

The evidence of the defendant and the two boys that were with him at the time of this difficulty give an entirely different version of what was said and done when Tanner and Robertson came into the premises where the defendant was working. They testified that Tanner told the boys that "this is my uncle, he has been looking for a damned good licking for a long time, and he is going to get it right now." Their testimony also is that when Robertson got out of the car with a pitchfork, he held it in a threatening position towards Palmer and was running towards Mr. Palmer at the time Palmer struck Tanner with a hammer, and he did not stop running until after Tanner was struck. A reading of the abstract discloses that there is quite a variance in the testimony of the appellee, and the witness, Robertson, in this trial and the former trial as to what took place at the Tanner farm, and what was said and done after they reached the Palmer premises, and before Tanner was injured.

From reading the abstract and additional abstract of the evidence in this case, we are not satisfied that the verdict of the jury is in accordance with the evidence, and think that the case should be reversed and remanded for a new trial. Judgment of the trial court is hereby reversed and the case remanded.

Reversed and remanded.

44737

A. JULES MILTEN,

Plaintiff - Appellee,

v.

MILDRED J. RAPAPORT,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

339 I.A. 509

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A. Jules Milten filed a statement of claim in the Municipal Court of Chicago to recover the amount of a real estate broker's commission for procuring tenants for the first and second floors of the property at 538-40 North Western Avenue, Chicago. Defendant filed a defense denying that she had employed plaintiff, that she had accepted any tenant procured by him, or that she was indebted to him. A trial without a jury resulted in a judgment against defendant for \$1,621.50, to reverse which she appeals.

In the trial there was a dispute as to the facts. There is no contention that the judgment is against the manifest weight of the evidence. Defendant contends that under the law applicable to the facts of the case, there should be no judgment against her. We must presume that the court found against defendant on the disputed issues of fact. There was competent evidence from which the court had a right to find that around the middle of September, 1947, plaintiff, in his capacity as a real estate broker, was authorized by defendant to procure tenants for the first and second floors of the premises. He submitted the space to the Palmer Company.

1. The first part of the document is a list of names and addresses of the members of the committee.

2. The second part of the document is a list of names and addresses of the members of the committee.

3. The third part of the document is a list of names and addresses of the members of the committee.

4. The fourth part of the document is a list of names and addresses of the members of the committee.

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After negotiating with it for about four weeks a lease was drawn. However, that company refused to sign the lease. Plaintiff did not make any claim for a commission in that transaction. On November 17, 1947, plaintiff showed the space to the Simmons Manufacturing Company. Thereafter, he notified defendant that this company was desirous of renting the first floor for a five year term commencing December 1, 1947, at a rental of \$500 per month. After defendant interviewed representatives of that company and secured references and credit information, it gave the defendant its check for \$500 for the first month's rent. The defendant notified the Simmons Manufacturing Company that she would have her attorney prepare the lease. She also authorized that company to have its carpenters and electricians enter the premises to prepare them for occupancy.

On November 18, 1947, plaintiff showed the second floor to Mr. Philip Blumenthal, a partner in a business operating as the Desplaines Manufacturing Company, and then introduced him to defendant. Mr. Blumenthal told defendant that the partnership was willing to rent the second floor and to execute a lease for the period from December 1, 1947 to April 1, 1953, at a rental of \$8,100 per year. After defendant checked the Desplaines Manufacturing Company in a financial rating book she said she thought the firm was well rated and that she would accept the deal, but she wanted a check for the first month's rent. Plaintiff took Mr. Blumenthal to his place of business and returned to defendant's office with a check issued by the Desplaines Manufacturing Company for \$675

for the first month's rent, which he handed to defendant. Philip Blumenthal testified that plaintiff took him through the premises and then introduced him to defendant. Mr. Blumenthal told the defendant that the floor was suitable and gave her business references. After discussing the terms of the lease, defendant told Blumenthal that she would telephone her attorney and have him draw up a lease. Blumenthal testified further that he was ready and willing to execute the lease and that the Desplaines Manufacturing Company had been in business ten years and that the company carried a bank balance of from \$10,000 to \$20,000.

On November 20, 1947, an associate of plaintiff called defendant on the telephone and asked whether he could contact her attorney for the purpose of drawing up the leases. She answered that he should not call the attorney because she was contemplating a change in attorneys and that she would call her "other attorney later on." Later on the same day plaintiff's associate again called defendant on the telephone and was advised that she contemplated leasing the space to "another concern." Thereupon plaintiff and his associate called on defendant at her office located on the third floor of the premises. They advised defendant that she had agreed to lease the two floors to plaintiff's clients. She said she was considering the acceptance of another deal. After telling her that she had subjected herself to liability for the commission, they asked her to return the two checks. She said: "No, I do not want to return the checks. I want to wait



until this other deal is consummated. I want to keep these two checks as security." They left without the checks. The following day plaintiff and his associate called on defendant at her office. She told them she had completed or was in the process of completing arrangements to lease half of the space to another concern. At their request she returned the checks.

A real estate broker has earned his commission when he procures a tenant who is ready, willing and able to execute a lease on the terms prescribed by the owner, even though the owner refuses to execute the lease. See Joice v. Norman, 192 Ill. App. 285^[Abst.] and Rushkiewicz v. St. George, 226 Ill. App. 310. Plaintiff, acting in his capacity as real estate broker, procured the Simmons Manufacturing Company as a tenant for the first floor and the Desplaines Manufacturing Company as a tenant for the second floor. Defendant checked on the tenants' credit and financial standing and notified plaintiff and the tenants that she would accept them as tenants and would have her lawyer prepare the leases. The evidence proved that both tenants were ready, willing and able to execute leases on the terms prescribed by the defendant. After she had accepted the two tenants procured by plaintiff, she received an offer to rent the two floors to Tropic-Aire, Inc. She executed a lease with that corporation on November 21, 1947, and then returned the two checks previously given to her. Plaintiff procured two tenants, each of whom was ready, willing and able to execute a lease on the terms prescribed by the defendant. The defendant notified the representatives of these concerns that she would accept them as tenants and that she would have her attorney

prepare the leases. In our opinion there was competent evidence from which the trial judge had a right to find that plaintiff earned his commission. Defendant introduced evidence to contradict much of the evidence offered by plaintiff. Because of our views no useful purpose would be served by detailing this testimony. We agree with plaintiff that defendant cannot defeat his claim for commissions by a refusal to execute leases with the tenants she had accepted.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

44871

ELSIE POKORNEY,

Appellee,

v.

WILLIAM POKORNEY,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

339 I.A. 510

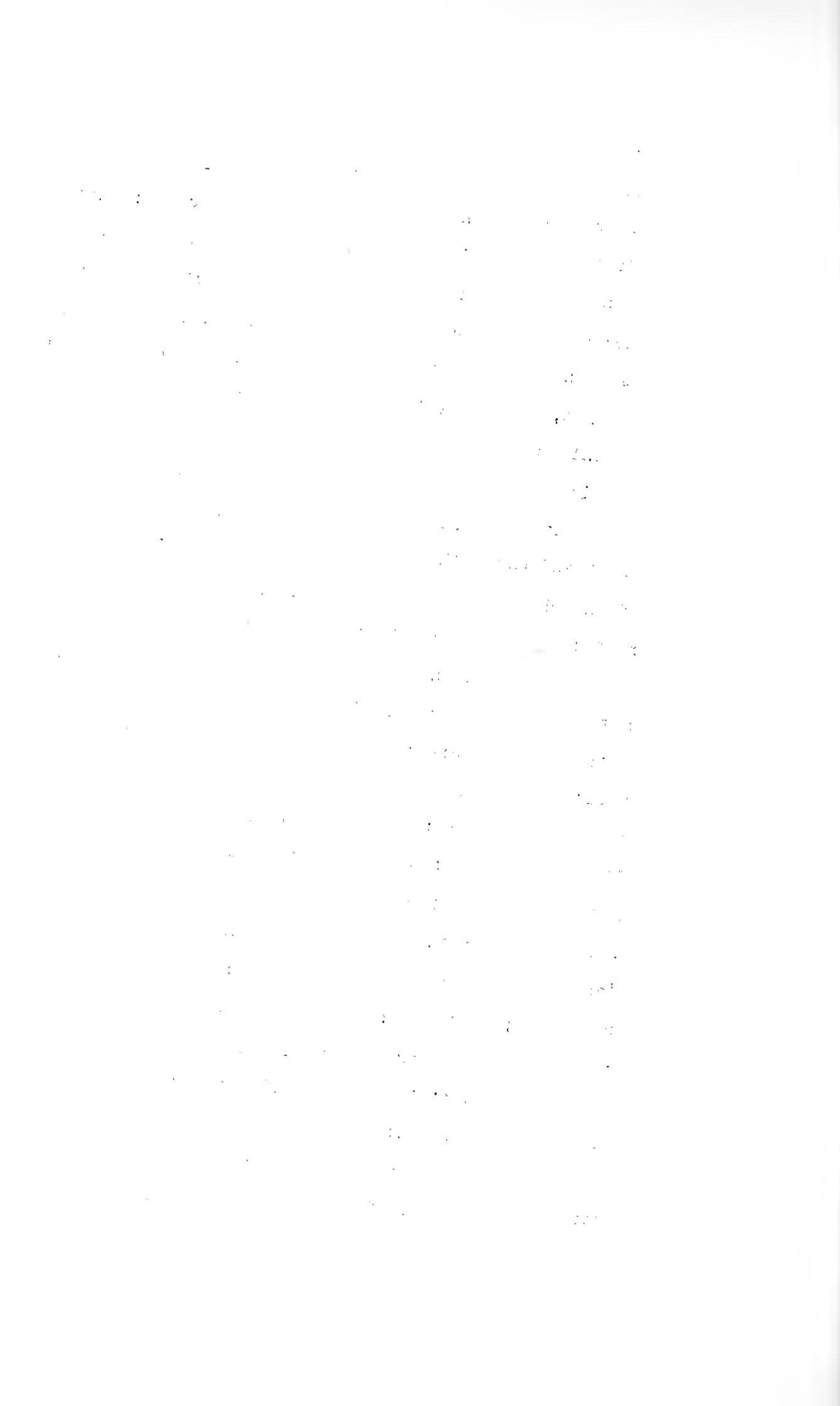
MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On January 19, 1935, Elsie Pokorney and William Pokorney were married at Chicago. A child, William Pokorney, Jr., was born to them on May 19, 1940. They separated on April 28, 1947. On May 17, 1948, in a complaint in the Superior Court of Cook County by the wife against the husband, a decree of divorce was entered on the ground of desertion, and he was granted the care and custody of the child until the health of the mother should improve. He was required to pay her alimony of twenty dollars a week commencing May 3, 1948, until the further order of the court, or until she should remarry, \$100 in satisfaction of temporary separate maintenance payments in arrears, costs and attorney's fees.

On January 20, 1949, defendant filed a petition alleging that subsequent to the entry of the decree he delivered the child to plaintiff "for a period of one month"; that upon the failure of plaintiff to return the child to him, a petition was filed and an order of court entered awarding custody of the child to her; that numerous efforts on the part of defendant to visit and take out the child were repulsed by plaintiff; that he has not visited with his

child since August 12, 1948; that plaintiff is not a fit and proper person to have the custody of the child; that in addition to the alimony provided to be paid by the decree, defendant was by a subsequent order directed to pay ten dollars a week for the support of the child; that "there has been a change of circumstances in that plaintiff is now employed, and for said order to continue for alimony is a hardship upon the defendant herein." He prayed that the order for alimony be modified, that plaintiff show cause why she should not be held in contempt for failure to permit him to visit and enjoy the company of his child, that the custody of the child be awarded to him, and for such other and further relief as the court might deem meet.

In an answer plaintiff averred that defendant had not paid any money for alimony or child support since the entry of the decree; that he "has never written to, called or visited with the minor son," nor has he ever made any request or demand on her to produce the child at any "given place or time"; that numerous demands were made on defendant to return the clothing belonging to the child, which defendant refused to do; that she sent the child to visit with defendant "and has on occasion been denied entrance" to defendant's residence; that under the decree she was entitled to receive certain personal property; that he had not delivered said property to her; that she "while enduring a long illness prior to the granting of the divorce was forced to borrow the sum of \$550 for medical services and medicines, none of which has been paid for by the petitioner"; and that she



"has always and continues to be a loving and devoted mother to her child in spite of the additional burdens cast upon her by the defendant." She prayed that defendant's petition be dismissed, that he show cause why he should not be held in contempt for failure to pay alimony and support for his minor son, and for failure to return the personal property belonging to her, that defendant be ordered to pay for the medical services and medicines required by plaintiff, that he be ordered to return to the child all of his personal property and clothing, that defendant be ordered to pay reasonable attorney's fees in the matter at hand, and that she be granted such other and further relief as the court might deem meet.

On April 8, 1949, the court entered the following order:

"This cause coming on to be heard, having been set for hearing, and all parties being present and being represented by counsel, and the Court having examined the cross petitions herein of the parties and having heard evidence and having examined the report of the Bureau of Public Welfare of the County of Cook, State of Illinois, And the Court after hearing all evidence finds that in accordance with the Report of said Bureau of Public Welfare, that there is not sufficient evidence to merit the disturbance of the custody of the minor child as it now exists under the orders of this Court and it is therefore ordered that the motion of defendant for the change of custody of the minor child shall be and is hereby denied. And the Court finding that in accordance with the evidence that on May 17, 1948 there was a decree of divorce entered herein which decree among other provisions ordered the defendant to pay to the plaintiff the sum of Twenty Dollars per week for her support; that at said date of the entry of said decree the defendant was earning approximately Sixty Dollars per week and that the plaintiff was not employed or in receipt of any income. That a petition filed by the defendant January 20, 1949 alleged that the income of the defendant has not increased whereas the plaintiff is now

employed and has been employed since November 1948; That there has been a change of circumstances and that the order allowing support for the plaintiff should be modified. That the evidence disclosed the above facts to be true, that the plaintiff is at present employed by the Fireman's Insurance Company of Newark, New Jersey and received for the month of November \$17.72, December \$134.13, January, 1949 \$140.92, February, 1949 \$154.89 and the month of March, 1949 the sum of \$162.40. That the Court does hereby find that the change of financial status of the plaintiff does not merit a modification of the Support Order entered May 17, 1948 and the Court does hereby order that the motion of defendant to modify and reduce the support order to the plaintiff, which order was retroactive as of January 20, 1949, shall be and is hereby denied. And the Court finding that the prayer of the plaintiff for an order on the defendant to pay to her \$550.00 for medical services rendered prior to the entry of the decree herein shall be and is hereby denied. The Court further finds and doth order that the defendant shall pay to Harold A. Pinkert, attorney for plaintiff, as and for attorney's fees One Hundred Dollars payable within 30, 60 and 90 days from date herein. To the entry of which orders pertaining to the change of custody, modification of the support order and attorney's fees, said defendant excepts and prays leave to appeal."

Defendant filed notice of appeal from the order and prays that it be reversed.

The first criticism leveled at the order by defendant is that the circumstances of the parties have changed to such an extent that the chancellor, in denying his motion to modify the decree, abused his discretion. He maintains that at the time of the entry of the original decree he was earning sixty dollars a week; that plaintiff was in ill health and unemployed and that the award of twenty dollars a week to her was based upon that situation; that by a subsequent order the custody of the child was restored to plaintiff and she was awarded an additional sum of ten dollars a week for the support of the child; that at the time of the hearing on the instant petition she was employed; that at the time of

the entry of the order appealed from she received \$120 a month from him and \$162.40 as salary from the insurance company, making a total monthly income for her of \$282.40; that he paid to her the sum of eighty dollars a month as alimony and forty dollars a month for child support, or a total of \$120 a month out of his earnings of \$240; and that if the court had modified the decree and suspended the alimony payments, defendant would have a net income after paying for the support of their child, of \$200 a month, and the plaintiff in accordance with the March income would have a net income of \$200 per month for herself and the child. Defendant argues from these figures that there was a substantial change in the financial status of the parties, in that leaving out of consideration the support of the child, plaintiff's income rose from eighty dollars to \$240 per month, while defendant's net income remained at \$160 per month before paying for the support of the child.

It will be observed that plaintiff's answer to defendant's petition also constitutes a cross petition, and that the parties and the chancellor so treated it. Although defendant appealed from the entire order and in his notice of appeal asks that the order be reversed, in the briefs he urges only two points, namely, that the chancellor abused his discretion in not modifying the decree, and that the part of the order requiring defendant to pay plaintiff's attorney the sum of \$100 is erroneous. The order appealed from recites that the court examined the pleadings, a Report of the Bureau of Public Welfare of Cook

County and "heard evidence." The court found that "in accordance with the Report of the Bureau of Public Welfare" there was not sufficient evidence "to merit the disturbance of the custody of the minor child," and that therefore the motion of defendant to change the custody of the child was denied. The succeeding paragraph is the one which recites the earnings of plaintiff and denies defendant's motion to "reduce the support order." The paragraph indicates that the order denying relief to defendant was based upon the evidence heard. The court found that "the change of financial status of the plaintiff does not merit a modification of the support order," and denied the prayer of plaintiff to allow her \$550 for medical services "rendered prior to the entry of the decree herein."

In Stillman v. Stillman, 99 Ill. 196, cited by defendant, the court said (202):

" * * * it would seem that when, for any cause, the alimony decreed becomes unnecessary for the support of the wife, or when circumstances transpire that make it inequitable she should have further allowance, it would be reasonable and proper for the court to absolve the husband from the burdens imposed by the decree."

In Kelley v. Kelley, 317 Ill. 104, the court said (109):

" ' When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, * * * as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. * * * And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, * * * as shall appear reasonable and proper. ' "

In Herrick v. Herrick, 319 Ill. 146, the court said (152):

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"The fact that the provision made for the support and maintenance of the wife is incorporated in the decree by agreement of the parties adds nothing to the force of the decree and does not affect the power of the court to enter further orders respecting alimony."

Defendant urges that under the doctrine announced in these cases the change of circumstances shown by the evidence is self-evident; that plaintiff has by her employment created a change of circumstances; and that the chancellor in denying his motion to modify the decree accordingly abused his discretion.

We are of the opinion that the defendant is not in a position to question the order appealed from as he has not brought to this court all of the facts considered by the chancellor. On appeal a finding of fact in a decree or order is presumed to be supported by evidence, and anyone who attacks such a finding has the burden of preserving the evidence. It must be presumed that the court heard sufficient evidence to support the statement in the decree. Sauter v. Pickrum, 373 Ill. 541. Under the Civil Practice Act the burden of preserving the evidence is upon the person attacking the order or decree. First National Bank of Chicago v. 10 West Elm Street Building Corp., 277 Ill. App. 337. In re Estate of Murray, 310 Ill. App. 121, the court said (126):

"The presumption is that the judgment of that court is in accordance with the justice of the case. The record shows that testimony was heard. The transcript of the testimony has not been included in the record. In the absence of the transcript of the evidence, we assume that such evidence supports the order sought to be reversed."

The decree shows that on the issues presented the court considered a report and also heard evidence. Neither the report nor the evidence has been preserved and brought here. The presumption is that the finding and order of the chancellor is correct, and that the evidence, if preserved, would support the finding and order. Therefore, we cannot say that the

chancellor abused his discretion in refusing to modify the decree.

Defendant asserts that the part of the order allowing plaintiff's attorney the sum of \$100 for his fee is erroneous. The instant proceeding was instituted by the filing of a petition by defendant, who sought custody of the child and a reduction in the alimony. It was necessary that plaintiff employ an attorney to represent her interests. In her combined answer and cross-petition she denied that defendant was entitled to the relief sought, and also asked affirmative relief from defendant including a prayer that he be coerced by the court to pay alimony and support money wherein he was delinquent. In Slezak v. Slezak, 293 Ill. App. 489, it appears that after the entry of a final decree of divorce the court denied to the former wife reasonable attorney's fees incurred in proceedings to enforce the alimony payments provided for in the decree. This court in reversing the order and remanding the cause indicated that the defendant, whose wilful disobedience to pay the alimony ordered compelled his former wife to employ counsel to enforce obedience, should be required to pay her reasonable attorney's fee. In the case at bar we assume, as previously stated, that a complete report of the proceedings would support the order for attorney's fees.

For the reasons stated, the order of the Superior Court is affirmed.

ORDER AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

October Term, A. D., 1949

Term No. 49-0-7

Agenda No. 7.

ROLAND WHITING and JAMES)	
WHITING,	)	Appeal from the
Plaintiffs-Appellees,	)	Circuit Court of
vs.	)	Williamson County.
WILLIAM G. GILCHRIST, JR.,)	
Defendant-Appellant,)	

339 I.A. 511-1

BARDENS, P. J.

On December 24, 1948, plaintiffs-appellees filed their complaint in the Circuit Court of Williamson County against William G. Gilchrist, Jr., defendant-appellant, for past wages due.

The complaint consisted of two counts. Count I alleges that Roland Whiting worked as a crane operator for Hiram E. Willson during a period from February 15 to March 31, 1947, inclusive; that as a result of such labor, said Hiram E. Willson became indebted to Roland Whiting in the sum of \$507.65; that defendant herein had loaned money and rented equipment to said Hiram E. Willson and under the provisions of an agreement signed by defendant and said Hiram E. Willson the defendant could take said mine over and run it until his total indebtedness was satisfied; that in pursuance to said agreement, Hiram E. Willson permitted and allowed the defendant herein to assume control and to operate said mine from May 1, 1947, to the last of October, 1947, when all the marketable coal was mined out of said mine; that in order to keep the said coal mine in operation and to keep the men at work thereat, subsequent to May 1, 1947, the defendant, orally promised to pay this plaintiff the back wages due him from

Hiram E. Willson and all future wages due; that defendant has paid back wages due the men working at the mine but that he failed to pay the plaintiff the back wages due him for the period aforesaid, though requested so to do.

The second count is exactly similar to the first with the exception that it is alleged that James Whiting worked for Hiram E. Willson as a construction worker for the same period and that said Hiram E. Willson thereby became indebted to said James Whiting in the amount of \$342.22. Subsequent allegations as in Count I follow concerning the transfer of control of the mine to the defendant herein, his oral promise to pay the wages due James Whiting, his payment of the other men's wages but failure to pay James Whiting's back wages even though requested.

This case was tried before the lower court without a jury. Judgment was rendered against the defendant on each count and in favor of each of the plaintiffs for the amount of wages claimed due in their respective counts. Costs of the action were assessed against the defendant.

From this decision appellant appeals to this tribunal. He assigns as error that the judgment of the trial court is against the manifest weight of the evidence and contrary to the law and evidence of the case, that certain evidence was erroneously introduced and that there was a variance between the proof introduced by plaintiffs and the cause of action as alleged.

The evidence introduced on behalf of the plaintiffs reveals that both men were experienced coal miners. They had an agreement with Hiram E. Willson whereby they would invest their labor and time in developing the mine for stripping coal. In return for this they were to receive a percentage of the profits. Even though the mine was developed on February 25, 1947, they testified that they would have taken

no percentage of the profits until after April 1, 1947.

In addition to this, when the mine was so developed, they were to go on a salary basis. The time records of both plaintiffs were kept by Roland Whiting from February 25 through the month of March. Their testimony and exhibits concerning the hours worked and wages thereby earned were sufficient to establish the respective amounts claimed by them in the original complaint. Mr. Willson was unable to pay the two April payrolls due the men working at the mine. Because of this and because he was unable to pay back money borrowed from the defendant and rental due said defendant, Mr. Gilchrist, on machinery rented, Mr. Willson allowed Mr. Gilchrist to take over the mine about May 1, 1949. At that time the men of the mine were ready to quit working unless their back wages were paid. On that date the defendant talked to the men, saying that he was going to take over the mine. He said he understood that Mr. Willson owed them their April payrolls together with certain debts owed to Roland Whiting and his father for work done prior to that time. Mr. Gilchrist then orally promised to meet the April payrolls by a certain date and to pay the other debts, including the Whitings', when the mine got into production. Within a short time the defendant paid all the April wages due, including those of the plaintiffs for that month. In the first week of July the plaintiff, James Whiting, presented his bill and that of Roland Whiting to the defendant for the time worked during the last of February and the month of March. Mr. Gilchrist promised to pay the bill when the mine was producing enough coal so that he could. In the first week of August and on either September 8th or 9th, James Whiting talked to the defendant and each time he promised to pay said bill.

The testimony introduced on behalf of the defendant is to the effect that the mine in question was owned by Hiram

E. Willson, Roland Whiting and his father, James Whiting. On May 1, 1947, the owners owed the defendant in the neighborhood of \$4,000.00 for money loaned and equipment rented for use in the mine. Mr. Willson requested the defendant to take over the mine. The defendant talked to the men working at the mine telling them he had some equipment there on a rental basis and had loaned money to meet the past payrolls and that he had been requested to take the mine over and pay the indebtedness. The defendant then asked Mr. Willson to give him a complete list of the indebtedness. He told the men working there that if they would continue to work he would meet the payrolls due if he could. If he was unable, then the mine would close. At no time during his talk to the men did he refer specifically to the Whitings. On the basis of the list of indebtedness furnished him by Mr. Willson, the defendant paid the April payrolls. This payment so made included the wages of the plaintiffs for that period. At no time did they make any mention of any other claim to the defendant. The defendant said he agreed to pay only those debts furnished him by Mr. Willson and that he confirmed said list by writing a registered letter to Mr. Willson which letter had never been returned to him.

The first time the defendant knew of the claim of the plaintiffs was in September, 1947, when James Whiting approached him with a bill for both plaintiffs' wages, saying that Mr. Willson had approved the bill and requested that he, the defendant, pay it. The defendant replied at that time that said bill was no concern of his but that plaintiffs would have to work it out with Mr. Willson. Corroborative testimony was introduced on behalf of both the defendant and plaintiffs to this action.

Enough of the testimony has been here set out to show

> that it was of a conflicting nature. It has been repeatedly held that an appellate court will not substitute its judgment for that of a lower court where the case was tried without a jury unless the lower court's findings are contrary to the manifest weight of the evidence. Here a question of fact was presented. There is sufficient evidence to sustain the court's judgment. Its discretion was not abused. X Appellant's contention must be denied.

James Whiting testified that on May 1, 1947, and at three subsequent dates, the defendant promised to pay their claims. This testimony of James Whiting was objected to by the defendant at the time of its introduction on the grounds that the Statute of Frauds was a bar to the introduction of same. This objection is now urged on appeal. By their pleadings the defendant denied the existence of any oral contract by him to pay plaintiffs' claims but did not specially plead the defense of the Statute of Frauds. However, the promise by the defendant was not properly within the Statute of Frauds. Mr. Gilchrist made the promise to pay back wages knowing that if he could persuade the men to continue working at the mine, he might be able to reimburse himself for the money loaned by him and the equipment rental due him. In such a case where the leading object of the undertaking is to promote some object of the party's own, his promise to pay is not within the Statute of Frauds, although its effect is to release or suspend the debt of another. Clifford vs. Luhring, et al, 69 Ill. 401. The defendant's 11 objection cannot be sustained.

Defendant also contends that improper evidence was admitted over objection of the defendant. We have examined the record and find that there is sufficient proper evidence in the record to justify the judgment. It is a well established principle of law that on a trial by the court without a

jury, no improper or incompetent evidence will be presumed by a reviewing court to have influenced the court in reaching a decision, where there is sufficient proper evidence to justify the judgment. MacAndrews & Forbes Co. vs. Mechanical Mfg. Co., 285 Ill. App. 81 at page 96 and cases cited, affirmed 367 Ill. 288; Maton Bros. vs. Central Ill. Service Co., 356 Ill. 584, at page 597.

Defendant also urges there is a variance between the pleadings and the proof. The cause of action as pleaded was proven. Plaintiffs' proof differed from the complaint only in that the complaint alleged that plaintiffs worked from February 15 to February 28, inclusive, whereas the proof showed the plaintiffs worked from February 25 to February 28, inclusive. This is not a variance but is included in the cause of action as pleaded.

The judgment of the Circuit Court of Williamson County is hereby affirmed.

Judgment affirmed.

Justices Scheineman and Culbertson Concur.

(Publish abstract only)

FILED
JAN 19 1950
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

In the
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

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October Term, 1949
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Term No. 4906

Agenda No. 5

EUGENE GRANT,)	
)	Appeal from the
Plaintiff-Appellee,)	
)	Circuit Court of
vs.)	
)	Williamson County,
NICK PAPPALAS,)	
)	Illinois.
Defendant-Appellant.)	

335 LA. 311²

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Hon. Harold L. Zimmerman, Judge.
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Scheineman, J.

This is an appeal from a decree of the Circuit Court of Williamson County affirming the Report of the Master in Chancery, ordering cancellation of a lease between Eugene Grant, plaintiff, and Nick Pappalas, defendant, and enjoining defendant from further prosecuting a forcible entry and detainer action for possession of the premises.

Plaintiff's complaint alleges that on June 16, 1948 he was the owner of certain premises which were then rented to one Kocich on a month to month basis for use as a tavern, that Kocich was also operating a bakery in another building, that on said date defendant told plaintiff that Kocich was selling out all of his property and was going back to the 'old country', that Kocich had already sold his bakery and that he, the defendant, had arrangements made with Kocich to buy his tavern and that he desired to lease the tavern of Kocich from plaintiff for the purpose of con-

tinuing to conduct the tavern; that relying upon and believing the statements of defendant to be true plaintiff executed a lease for said premises to defendant, that but for said statements of defendant which plaintiff believed and relied on he would not have executed and delivered said lease; that said statements of defendant were false and fraudulent as to existing matters of fact and were known by the defendant to be so and were made for the sole and only purpose of deceitfully and fraudulently procuring the execution and delivery of said lease; that as a matter of fact said Kocich had not sold his bakery, was not intending to go back to the old country and the defendant had no arrangements whatever with Kocich to buy his tavern; that plaintiff upon learning of the true facts returned to defendant the advance rentals and his copy of the lease; that upon execution and delivery of the lease defendant successfully prosecuted a forcible entry and detainer action against Kocich in a Justice of the Peace Court and that said suit is now on appeal in the Circuit Court of Williamson County; that plaintiff has no adequate remedy at law, cannot be adequately compensated in damages and will suffer irreparable injury unless defendant is restrained by injunction from further prosecuting his said forcible entry and detainer suit; that wherefore plaintiff prays that said lease be cancelled and declared null and void and that defendant be enjoined from further prosecuting his said forcible entry and detainer suit and from instituting any further suit for possession of said premises.

Defendant moved to strike said complaint on the grounds that it pleads conclusions only, states no further grounds sufficient to justify cancellation of said lease and if materially defective in that it does not appear other than from the conclusions pleaded that plaintiff has no adequate remedy at law and further, that it does not appear from the

complaint that any irreparable injury can possibly inure to the plaintiff.

Said motion of defendant being overruled defendant answered denying the pertinent allegations of plaintiff's complaint and counterclaimed against plaintiff for damages in the amount of \$12,950.00 for expense incurred and anticipated profits. To said answer and counterclaim plaintiff entered a reply denying the allegations thereof.

The case was thereupon referred to the Master in Chancery and upon the basis of his report, excepted to by defendant, the Court entered a decree cancelling the lease and issuing an injunction as prayed against the defendant.

Defendant contends that the Court erred in overruling defendant's motion to strike plaintiff's complaint, that said complaint does not state a cause of action, and that the Master's Report and the order and decree of the Court thereon are contrary to the law and evidence of the case.

It is the opinion of this court that all the elements necessary to constitute a fraudulent misrepresentation warranting a court of equity to cancel a contract induced thereby are present in the subject complaint. Such elements, as stated in *Roda v. Berko*, 401 Ill., 335, are as follows: "It must be a representation in the form of a statement of a material fact, made for the purpose of inducing the other party to act. It must be false and known by the party making it to be false, or not actually believed by him, on reasonable grounds, to be true. The party to whom it is made must be ignorant of its falsity, must reasonably believe it to be true, must act thereon to his damage, and in so acting must rely upon the truth of the statement".

The principal contention of the defendant as to the sufficiency of the complaint is that it contains no averments of misrepresentations which could be classed as state-

ments of material facts. In our opinion, the alleged statements by defendant "that Kocich was selling out all his property and was going back to the old country, that Kocich had already sold his bakery, that defendant had arrangements made to buy the tavern, and desired the lease from plaintiff in order to continue the tavern" do constitute positive statements of fact. Their substance would necessarily indicate to plaintiff that he was about to lose his tenant, with a possible resulting vacancy and loss of income. Naturally they would tend to induce the landlord to make a deal with a new tenant. If the statements were false, and known to be false, the legal inference follows that they were fraudulent, and made for the purpose of deceiving the plaintiff. All other necessary allegations were present, and it follows, the defendant's motion to strike the complaint was properly denied.

There is no question that the evidence herein is conflicting, but there is substantial proof of all material allegations. In our opinion there is reasonable ground to believe the testimony in behalf of plaintiff, as against that which is contradictory. His own testimony substantiates all his allegations, except the one that defendant had already begun negotiations for purchase of the tavern. As to this, he admitted, upon consideration, that he could not recall an exact statement to that effect, that it was his inference from all the other conversation. We do not propose to set forth all the evidence, but suffice to say, the sum and substance of defendant's statements were well calculated to create such an inference.

Plaintiff's wife did not hear all the conversations, but did corroborate her husband in essential particulars, as to material matters she did overhear. She ascribed some statements to defendant, but admitted on cross-examination

they may have been statements by her husband, assented to by defendant. Since they could be truthfully the substance of the conversation in either event, it is useless to belabor such a point.

Other points have been argued as to the evidence, all of which we have examined and considered. We would not assert there is a total absence of any merit in defendant's points. There were some erroneous rulings, which were obviated by other competent evidence; and other objections involve solely the interpretation of witnesses' statements, and the question of weight to be given each. We deem the conclusion inescapable that defendant used such means as he had to perpetrate a deliberate and intentional fraud.

Finally, defendant points to the fact that the plaintiff lived in the country only about two miles from the small city containing the site of the tavern, and argues he could easily have investigated the statements made to him, and his negligence in failing to do so should bar him from any relief in equity. While there are cases in which negligence may bar relief, the general rule in this state is clear: A party guilty of fraudulent conduct whereby he induces another to act will not be allowed to impute negligence to the latter as against his own deliberate fraud. *Pustelniak vs. Vilimas*, 352 Ill. 270; *Kehl vs. Abram*, 210 Ill. 218; *Leonard vs. Springer*, 197 Ill. 532; *Linington vs. Strong*, 107 Ill. 295. The general rule was recognized in *Morel vs. Masalski*, 333 Ill. 41, but was not applied where there were facts and circumstances present at the time of the false representations, sufficient to put the injured party upon his guard and to cast suspicion upon their truth.

The ramifications of this principle are discussed at length in 23 Am. Jur. "Fraud and Deceit", Sec. 155, from which defendant quotes as follows:

"--it is well agreed that where the means of knowledge are at hand an equally available to both parties, and the subject matter is equally open to their inspection, if one of them does not avail himself of those means and opportunities, he will not be heard to say that he was deceived by the other's misrepresentations."

In the full text, the above quotation is preceded by these words: "in the absence of accompanying actual deception, artifice or misconduct". The significance of this phrase appears to have escaped counsel for defendant. The long paragraph in question concludes with a statement of principle which coincides with that announced in the five Illinois citations above given.

With reference to the injunction, the lease being null and void, it was proper to enjoin defendant from further prosecuting his suit for possession of the premises. The decree is affirmed.

Decree affirmed.

Bardens, P. J. and Culbertson, J., concur.

(Publish Abstract only)

FILED
JAN 19 1950
Stanley R. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL. '315

In the
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

October Term, 1949

Term No. 49018

Agenda No. 11

L. SMOTHERS and ROY EDMONDS,))	
Plaintiffs-Appellants, )	)	Appeal from the
-vs- )	)	Circuit Court of
ED KOCH and BERTHA KONHORST, )	)	Marion County,
Defendants-Appellees. )	)	Illinois.

----- 3391A-2121
Hon. James G. Burnside, Judge.

Scheineman, J.

This is an appeal from the judgment of the Circuit Court of Marion County denying the right of plaintiffs, L. Smothers and Roy Edmonds, to recover an additional sum in commissions alleged to be due them for effecting the sale of certain property of the defendants, Ed Koch and Bertha Konhorst. A motion to dismiss as to plaintiff Roy Edmonds was allowed and the same is not being contested herein.

The undisputed facts reveal that Smothers was at all times a duly licensed real estate broker. Edmonds, while licensed as a salesman under another broker, obtained a ninety-day listing of defendants' hotel building, and then subsequently after the expiration of his said license and prior to obtaining a license under broker Smothers, he again approached defendants and acquired another ninety-day listing of the hotel in the name of Smothers.

Both of the listings above mentioned consisted of contracts in writing, signed by the defendant Koch, the first

with a broker named Beecham, and the second with plaintiff, Smothers. Both provided for a selling commission of 5%. No sale was effected during the time limits of these contracts. There never was another written agreement, but the property was later sold, pursuant to a purported oral agreement between Edmonds and the defendant Koch.

The evidence is vague and conflicting as to the substance of this agreement. It consisted of a conversation between Edmonds and Koch. The latter testifies its substance was that Smothers was not to be considered, that there would be no broker involved, that Edmonds was to act as an individual agent, that the commission was not fixed, but was to be arranged between them, that they would take care of it between themselves. Mrs. Koch testified to the effect that Edmonds indicated he realized this was not a sound legal position, but that he said "I know you will treat me all right."

Edmonds denies most of this. He asserts that Mrs. Koch was not present at the conversation, that Smothers name was not mentioned, that Koch said he would pay the commission, but no amount or rate was mentioned. In explanation of the failure to put the new agreement in writing, he asserts that Koch said not to bother him with it, that his word was good.

It is strange that owners who were obviously desirous of selling, and who had twice previously signed broker's contracts, should then rely upon a mere oral conversation, unless there was some reason to depart from their previous custom and manner of dealing. In our opinion, the trial court was justified in finding and concluding there must have been some new undertaking different from their former contracts.

The court would have been justified in dismissing the suit on the sole ground that no contract with the plaintiff, Smothers, was proved. Apparently the court was moved

by the vagueness of the oral dealings to proceed on the theory that plaintiff might be entitled to recover under a quantum meruit, which was an alternative prayer of the complaint. The trial proceeded, and upon the basis of the following evidence, at the conclusion thereof, the court indicated an opinion that the suit was barred anyway, by an accord and satisfaction:

After the sale of the property had been affected, Edmonds called on Koch and asked for his commission. He says that he asked for his full 5% commission which amounted to \$1650.00, but admits he did offer to accept \$800.00. Koch asserts that Edmonds never did ask for 5% but that he first requested \$1100.00 and then reduced his demand to \$800.00. Koch says he agreed to think it over, but the next day informed Edmonds he would not pay more than \$500.00 and gave a check for that amount which Edmonds accepted and cashed. Edmond's testimony on this is that when Koch handed him the check, Koch said "That's all you're going to get", and that he replied, "I'll take the check, Ed, but I'm not satisfied, Ed. You're not treating me right." It is also disputed whether a notation on the check, "For Com. selling West Side Hotel Building and Fixtures", was there when the check was passed, or added afterward.

The pleadings consisted of complaint and answer, which denied its allegations; subsequently, after both sides rested, defendants were given leave by the court to amend their answer and plead accord and satisfaction and the hearing was continued for six days. Thereafter, said amended answer and the reply thereto having been filed, additional testimony was heard. ✓

The principal and pertinent contentions of the plaintiffs are as follows: (1) that the trial court erred in suggesting at the close of plaintiffs' case that the only

issue presented was one of settlement and satisfaction, and thereafter, in granting leave to defendants to amend their answer after both sides had rested in order to plead accord and satisfaction; (2) that the court erred in holding that the facts elicited in the trial were sufficient to support an accord and satisfaction; (3) that the court erred in holding that Edmonds, as an agent and salesman for Smothers, had authority to accept a lesser sum in full satisfaction of the amount claimed.

Granting leave to defendants to amend their answer, after both sides had rested their case, was wholly within the discretion of the trial court limited only by the requirement that such allowance be made on such terms as are just and reasonable. Ill. Rev. Stat., 1949, Ch. 110, Par., 170. Our courts have liberally construed this statute. In the present instance, the proof offered tended strongly to support the theory of an accord and satisfaction and in the furtherance of justice the trial court did not in any way abuse its discretion in allowing such amendment. The court having continued the case six days to permit the filing of the amendment and the reply thereto, and the taking of additional testimony, the plaintiff cannot complain that the terms were other than just and reasonable.

In considering plaintiffs' contention on the question of an accord and satisfaction it may be well to reiterate the fundamental rule that, where there is a bona fide dispute between a debtor and creditor as to how much is due, a payment of the amount claimed by the debtor to be due, in full settlement, if accepted by the creditor, is a satisfaction of the claim. The creditor must either accept what is offered with the condition upon which it is offered or refuse it. *Quinlan & Tyson v. National Casualty Co.* 311 Ill. App., 369. Applying this rule to the facts in this case, it is

apparent that there was a bona fide dispute between the parties as to the amount owed, for there is credible evidence that, prior to and at the time of his acceptance of the check, Edmonds never did demand a full five per cent commission in the amount of \$1,650.00 and in fact, on the day before the delivery of the check, he admits he agreed to take \$800.00. Likewise all of the circumstances surrounding the sale and the negotiations relative to the commission point to a dispute over the amount.

As to whether the check was offered to him on condition that he accept it in full settlement, it is apparent that he was told he had not earned any more than that, and it is even admitted by him that he was given the check with the statement, "That's all you're going to get". In addition, though there is some claim that the notation on the check, "For Com. Selling West Side Hotel Building & Fixtures", was placed there at a later date, yet it would not be contrary to the weight of the evidence to hold that such notation was on the check at the time of acceptance. This notation in itself would not necessarily prove that it was tendered as payment in full, but when considered with the surrounding circumstances, it is believable that it was so intended and so understood. Likewise, there was a complete acceptance by Edmonds, with knowledge of the condition when he said, as appears in his testimony, "I'll take that check, Ed, but I'm not satisfied, Ed. You're not doing me right". Mere expressions of dissatisfaction with the settlement are not the same as rejection thereof. That the creditor protests, and expresses disappointment does not alter his actual acceptance of the check in full settlement, for he must either accept what is offered with the condition with which it is offered, or refuse it. Kall v. Block Co. 319 Ill., 339. Under the circumstances, acceptance of the check constituted full satisfaction of the amount owed.

The contention of the plaintiffs that Edmonds, as a salesman and agent for his broker Smothers, had no authority to accept a lesser sum than was owed, and that there is no proof of any ratification or acquiescence in the act of his agent by Smothers, is not borne out by the facts. Actually, there is probably sufficient evidence to prove that Edmonds was acting wholly for himself and in his individual capacity, though we do not feel it necessary to decide this particular point herein. The plaintiff's own testimony indicates he regarded Edmonds as the one to decide what should be done about the commission in this particular case, although he did deny that such was the usual custom. The judgment is affirmed.

Judgment affirmed.

Bardens, P. J., and Culbertson, J., concur.

PUBLISH ABSTRACT ONLY

FILED
JAN 19 1950
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

44842

LIBERTY NATIONAL BANK OF CHICAGO
AS TRUSTEE UNDER TRUST AGREEMENT
DATED NOVEMBER 15, 1945; and
KNOWN AS TRUST NO. 6246,

Appellee,

v.

NATIONAL EQUIPMENT & SUPPLY CO.,
INC.,

Appellant.

APPEAL FROM
SUPERIOR COURT COOK COUNTY

331A-512²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying its motion to vacate a judgment for \$1,022.50 entered by confession on a lease of commercial property.

The petition filed alleges that the premises were to be used for "electronics, warehousing, mail order, display office, also retail sales and general merchandising of electronics"; that a part of the premises consisted of a loading and unloading platform in the rear of the leased building, free ingress and egress to which by truck and motor vehicle is imperative; that such ingress and egress has been permanently shut off, making the leased premises unfit for the purpose for which they were leased; that plaintiff "had knowledge that free access to the loading and unloading platform, which is a part of the leased premises, was to be shut off-- and *** withheld said information from the defendant corporation, and in so doing, fraudulently induced the defendant corporation to execute the lease under which confession of judgment has been had"; that defendant was not cognizant that access to the loading and unloading platform was to be

2.

cut off, and "relying on the fact that previous tenants had had free access to the loading and unloading platform, and being led to believe by the plaintiff landlord that it also would have free access thereto, executed the within-mentioned lease"; that when free access to the platform was denied, defendant "did immediately notify the landlord that same had been done and that the premises leased from it were not usable for the purpose intended, but that the landlord did not remedy the situation"; that defendant was compelled to vacate the premises, with a great loss of business and expense to it.

Rule 26 of the Supreme court requires that a motion to open ^a judgment by confession be supported by affidavit in the manner required by Rule 15 for summary judgments. The latter rule provides that affidavits in support of or in opposition to a motion for summary judgment "shall set forth with particularity the facts upon which the claim, counter-claim or defense is based; *** shall not consist of conclusions but of such facts as would be admissible in evidence; and shall affirmatively show that the affiant if sworn as a witness, can testify competently thereto." The petition before us does not meet these requirements. It fails to state facts upon which a concealment of knowledge that access to the loading and unloading platform was to be shut off could be the basis of a charge of fraud invalidating the lease. It does not state who denied defendant access to the platform. Neither does it show when the defendant vacated the premises. There is no denial of occupancy of the premises during the period for

3.

which plaintiff sought and recovered a judgment for rent. Defendant attempts to supply some of these deficiencies by statements of fact in the brief and on oral argument not contained in the petition or in affidavits supporting it. These statements must be ignored.

The court properly denied the motion to vacate. The order is affirmed.

ORDER AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

44813

ALBERT E. GILL,

Appellant,

v.

WEST END PINE APARTMENTS, INC.,
a corporation, ANNE ALLEN,
LOUIS STEIN, VELVA LORES COHEN,
LA SALLE NATIONAL BANK, a cor-
poration, as trustee under trust
agreement known as trust No.
11175, and "UNKNOWN OWNERS,"
Appellees.

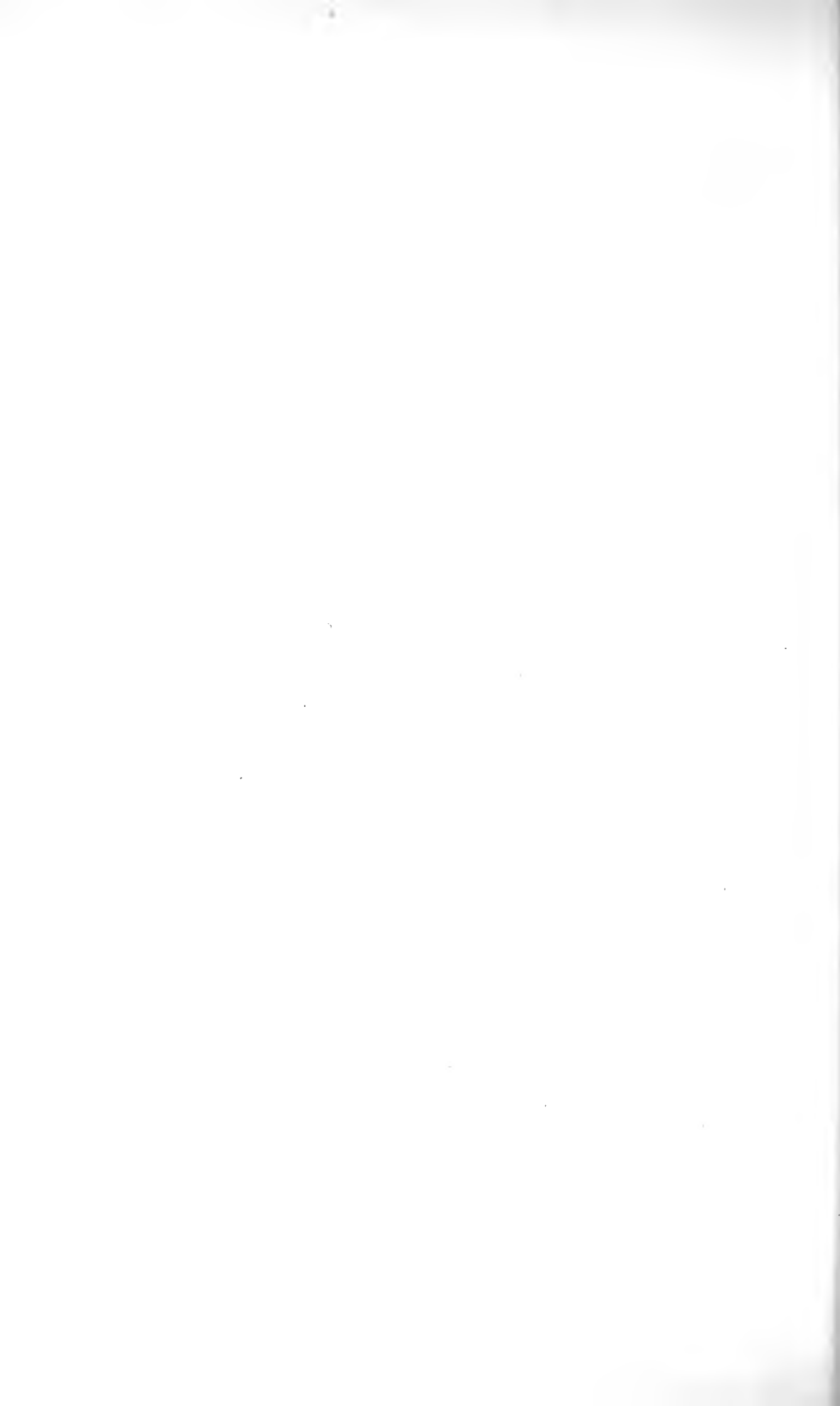
APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

3391.A. 513

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

On December 4, 1947 plaintiff filed an unverified complaint in the Superior Court by which he sought to set aside a sale and conveyances by West End Pine Apartments, Inc., one of the defendants herein, to Velva Lores Cohen, and by her to La Salle National Bank as trustee under a trust agreement known as trust No. 11175. The complaint alleged in substance that plaintiff owned seven of the 3367 outstanding preferred shares and three of the 1994 outstanding common shares of the corporation which owned real and personal property and operated a furnished apartment building in Chicago; that on December 1, 1946 he received notice of a special stockholders' meeting to be held December 20, 1946 to consider an offer to purchase the assets of the corporation for \$215,000.00, made by Anne Allen as nominee for Louis Stein, the president of the corporation; that he did not vote in favor of the sale; that the sale was completed and the proceeds distributed to the shareholders on presentation of their stock certificates; that on



December 21, 1946 the corporation conveyed the property to the defendant Cohen as nominee of Stein, and two days later Stein caused Cohen to convey the property to the La Salle National Bank as trustee; that Stein was in a fiduciary capacity toward the other stockholders, and the assets sold were worth not less than \$300,000.00; that all seven directors of the corporation voted to approve the sale for \$215,000.00; that Stein either owned directly or had control of more than 50 per cent of the outstanding shares, and voted said shares in favor of the sale of assets.

Upon the basis of these allegations it is alleged that the sale was illegal, and plaintiff asked that the contract for the sale of the assets of the corporation to Anne Allen be set aside; that the conveyance by the corporation to Velva Lores Cohen be set aside and held for naught; that the conveyance by Velva Lores Cohen to the La Salle National Bank as trustee likewise be set aside; that the corporate defendant, West End Pine Apartments, Inc., be re-invested with the title to the real estate and personal property conveyed by it; and that the defendant Stein be required to account for all net rentals and income from the time of the conveyance up to the time of the filing of the bill.

All defendants joined in a motion to dismiss the complaint upon the twofold ground (1) that the complaint did not state a cause of action, and (2) that plaintiff had not alleged compliance with the statute relating to

the sale of assets of a corporation (Illinois Revised Statutes 1947, ch. 32, sec. 157.73). On October 19, 1948 the chancellor entered the following order: "On Motion of Attorneys for defendants to dismiss the complaint and after argument of counsel, the motion is allowed and plaintiff is given 10 days to file an amended complaint." After plaintiff had obtained leave to file an amended complaint within ten days, he failed to do so, and thereafter, on motion of defendants and due notice to plaintiff, the court on November 4, 1948 entered an order reciting that plaintiff had failed to file an amended complaint within 10 days and dismissing the suit for want of equity. It thus appears that he had abandoned the suit, but subsequently he took an appeal from the order of November 4, 1948 directly to the Supreme Court of Illinois, which transferred the cause to the Appellate Court without an opinion. The only error assigned as ground for reversal is the allowance of the motion to dismiss the complaint of October 19, 1948. However, by obtaining leave to file an amended complaint but failing to do so, he waived his right to assign error on the dismissal of the original complaint.

The courts of this state have consistently held it to be an elementary rule that where a party acquiesces in an order of court sustaining a demurrer to a pleading and takes leave to plead again, he cannot afterward assign error on such ruling. Doyle v. City of Sycamore, 193 Ill. 501; People v. Opie, 304 Ill. 521, citing People v. Core,

85 Ill. 248. See also Dodd and Edmunds Illinois Appellate Procedure (1929), sec. 813, p. 557.

Upon the state of the record any question with respect to the correctness of the prior ruling of October 19, 1948 sustaining the motion to dismiss was completely eliminated from the case when plaintiff, immediately after the motion had been sustained, voluntarily sought and obtained leave of court to file an amended complaint within ten days, and the only question before the court when the decree of November 4, 1948 was entered was whether appellant was in default for failure to have a complaint on file; no other question was or could properly have been passed upon by the chancellor in connection with that decree. Plaintiff in his brief makes no attempt to justify or excuse his default, but argues only the merits of the original complaint which was dismissed. For the reasons indicated, he is precluded from doing this, having failed to stand by the original complaint, and after it was dismissed, having voluntarily sought and obtained an order to allow further pleading.

Accordingly, the decree of the Superior Court is affirmed.

Decree affirmed.

Scanlan and Sullivan, JJ., concur.

121 A

339 I.A. 573¹

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION

In a forcible detainer proceeding plaintiff had

Plaintiff's statement of claim was filed December

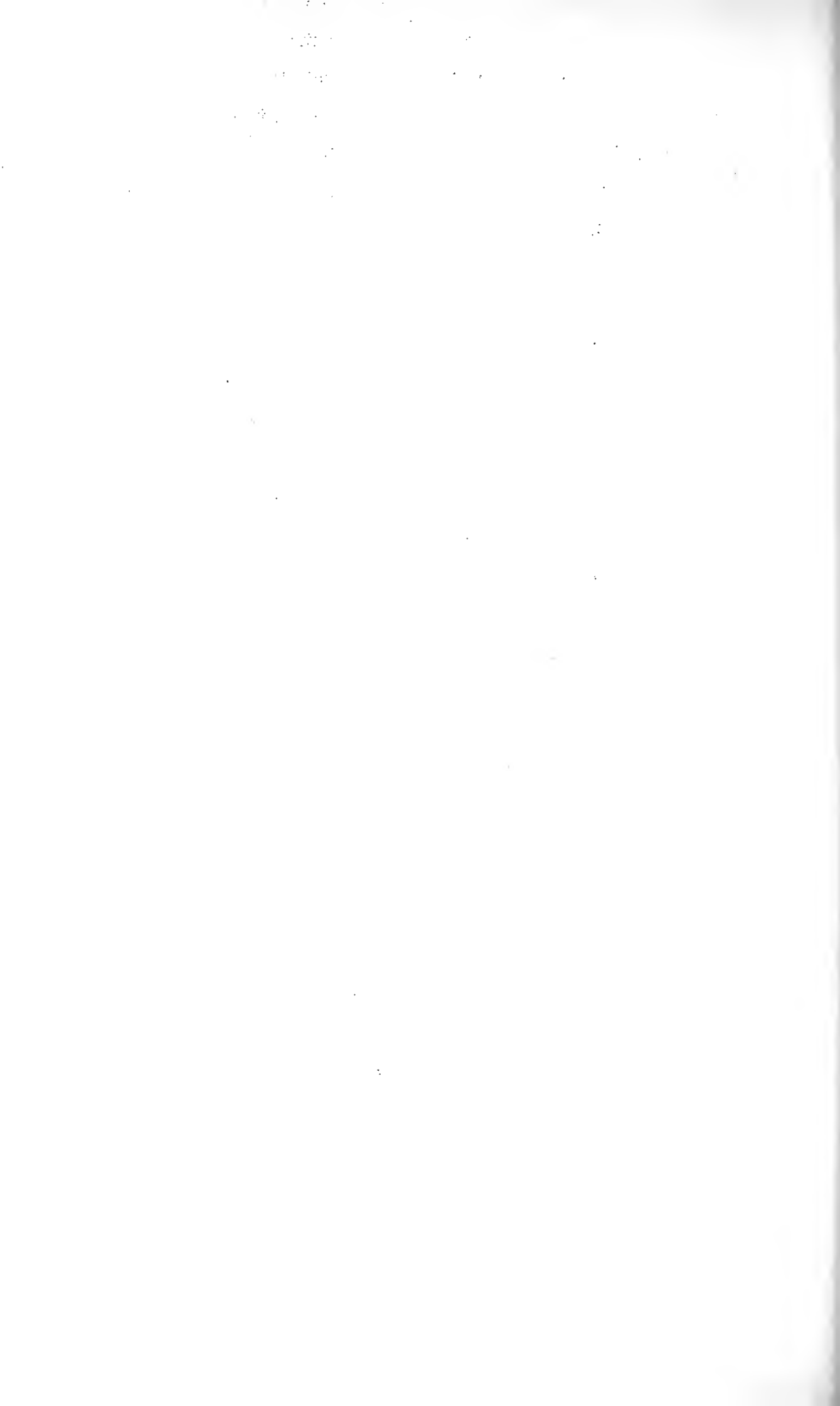
Subsequently, on August 23, 1948, defendant made

as the reason therefor that "to make the defendant move would cause great hardship on her." The court allowed the motion and entered an order that rent be paid at the rate of \$250.00 per month "for use and occupancy for the period writ of restitution is stayed, without prejudice." Having thus obtained a stay of the writ for almost a year, defendant appeared before Judge Eugene J. Holland on November 23, 1948 in the absence of Judge Hermes, and moved the court for an additional stay of the writ for the same reason previously assigned. That motion was overruled. It thus appears that up to the time notice of appeal was filed and subsequent to the entry of the judgment for possession, defendant had remained in the premises for about 330 days, and since then over a year has elapsed.

Two points are urged as grounds for reversal, neither of which was raised in the Municipal Court or preserved of record. It is first contended that when Judge Hermes entered the order staying the writ of restitution for an additional 90 days on August 23, 1948 and ordered defendant to pay rent at the rate of \$250.00 per month for use and occupancy of the premises, there was "created a new relation of landlord and tenant, between the Plaintiff-landlord, and Defendant-tenant. There was a novation of contract." None of the cases cited by defendant in support of this contention aid her position. The rule is well settled that it is an essential element of novation that the parties must

intend to substitute a new for an old contract. There is nothing in the record to indicate any such intent. Plaintiff has consistently relied upon the judgment obtained on January 15, 1948, and his counsel say that he regularly complained of the unwillingness of the court to permit him to enforce his judgment. Moreover, there is nothing in the record to show that defendant paid the sum of \$250.00 per month or that plaintiff accepted that sum. We must assume that defendant received the benefit of the two stay orders and remained in possession, and plaintiff's counsel say that defendant collected the rent from subtenants who occupied the premises, and still occupies the apartment.

As a second point for reversal it is urged that Judge Holland, who entered the final order denying an additional stay of the writ of restitution, was without jurisdiction to enter any finding because he did not originally set and hear the cause. There is absolutely no merit in this contention. For some reason not disclosed of record Judge Hermes was absent from the court on November 23, 1948, and the matter was heard by Judge Holland at the instance of defendant. The Municipal Court Act (Ill. Rev. Stat. 1947, ch. 37, sec. 368) specifically provides as follows: "That the judges of said Municipal Court may interchange with judges of other city courts, and with county judges, and said respective judges may hold court for each other and perform each other's duties when they find it necessary or convenient." Under that provision of the statute and the common practice in the Municipal



-4-

Court Judge Holland properly heard the motion and entered an order thereon.

This appeal is manifestly taken for the purpose of holding possession of the premises. Plaintiff is entitled to possession of the premises for which judgment was entered January 15, 1948, two years ago. Accordingly, the judgment of the Municipal Court is affirmed.

Judgment affirmed.

Scanlan and Sullivan, JJ., concur.

44579

MARIE MEININGER,

Appellee,

v.

BROOKS LAUNDRY COMPANY, a
corporation, and MID-CONTINENT
LAUNDRIES, INC., a corporation,
Appellants.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

1224
339 1A. 373²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE
COURT.

Marie Meininger, plaintiff, sued to recover damages
for personal injuries and for damages to her Buick auto-
mobile as the result of a collision between her automobile
and a laundry truck owned and operated by defendants. A
jury returned a verdict finding defendants guilty and
assessing plaintiff's damages in the sum of \$7,500. De-
fendants appeal from a judgment entered upon the verdict.

The collision occurred on May 15, 1946, at about
10 o'clock A. M., at the intersection of Augusta and
East streets in the village of Oak Park, Cook county,
Illinois. Augusta street runs east and west and East
street runs north and south. Both streets are approxi-
mately thirty feet wide from curb to curb and are paved
with macadam or asphalt. There were no traffic signs or
lights regulating traffic at the intersection. The
weather was clear and the sun was shining. The streets
were slightly wet. Just before the accident plaintiff
was driving her Buick automobile in an easterly direction
along Augusta street. Defendants' truck was proceeding
in a southerly direction along East street. The houses
along both streets are set back from the sidewalk line

and drivers approaching the intersection have a clear view for some distance down the intersecting streets. Plaintiff and the driver of the truck were the sole witnesses to the accident. Plaintiff testified that she was thirty-four years old, had been married for sixteen years, and that her "occupation is physiotherapy"; that she had driven an automobile for many years; that she was proceeding east on Augusta street at a speed of between twenty and twenty-five miles per hour; that when she was forty or fifty feet west of East street she looked and saw defendants' truck about 200 feet to the north, and approaching "pretty fast"; that at the time of the occurrence she assumed that Augusta street was a through street (which was not the fact); that when she observed defendants' truck she swerved over toward the curb, stepped on the accelerator, increased her speed a little, and started to cross the intersection. Plaintiff first testified that after she saw the truck 200 feet away, "the next time I saw the truck was when the accident occurred. At that time the truck was right in front of me." During her cross-examination the following occurred: "Mr. Hinshaw [attorney for defendants]: I say if you had looked you could have seen the truck all of the last 200 feet, couldn't you. A. More so." Upon re-direct examination the following occurred: "Mr. Abrahamson [attorney for plaintiff]: Q. When did you next see it [the truck] during those 200 feet. * * * A. When I was a few feet away from the corner. * * * Mr. Abrahamson: Do you know in fact where he was. * * * A. At least 100

or 150 feet. Q. What did you do? A. I crossed over." Plaintiff admitted upon cross-examination that on January 7, 1947, her deposition was taken and that at that time she stated that after she saw the truck 200 feet to the north she did not look to see whether that truck was coming at any time before the collision. She testified that the front of her car came into contact with the side of the truck.

John Arrington, the driver of the truck, testified that he had been driving automobiles for thirty years and that the only other job he ever had was the six years he spent in the Army; that he had worked for the Brooks Laundry for eighteen years; that as he approached Augusta avenue he was making about fifteen miles an hour and that as he entered Augusta to cross it he was making about twelve miles an hour; that when he first saw the Buick it was about 150 feet to his right; that at that time his truck was about twenty-five to thirty feet from the intersection, "that would be north of the curb"; that from then on he maintained a speed of about twelve miles an hour; that he did not turn the truck one way or the other before the accident; that he was driving on the right side of the street near the center line; that the parts of the cars that came together were the front door of his truck and the front end of the Buick; that his truck was about fourteen feet long and the door of his truck was struck; that the truck was knocked on the southeast corner; that before he was struck he was still on the right side going south;

that the truck was moved fifteen feet by the impact; that after the accident happened his truck was facing southeast; that the nose of it was facing southeast and catty-cornered or rather facing that way; that the two front wheels of the truck were up on the lawn and the two back wheels were just on the curb; that he was knocked to the bottom of the truck and two teeth were loosened and he eventually lost them; that after he got out of the truck he saw that the hood of the Buick was sticking in the side of the door of the truck.

The police officer, who arrived at the place of the accident about four minutes after it occurred, testified that the truck was "on the side up over the curb on the southeast corner of Augusta and East Avenue. The rear wheels were at the edge of the curb; the rest of the truck, the front of it, was on the parkway, some of it on the public walk at the southeast corner"; that the rear wheels of the automobile were right in the middle of the intersection; that the better part of the car was past the south lane of East avenue; that the automobile was facing east in a very slight southwardly direction. A second police officer testified that the driver of the truck told him that he had been southbound on East avenue and that he did not see the passenger automobile, which was eastbound on Augusta street, until he was out in the intersection; that he then tried to go out in front of it and to the left.

Defendants urge a number of points in support of

their contention that the judgment should be reversed, but in our judgment it is only necessary for us to consider one: Defendants contend that even if it be assumed that the driver of the truck was negligent, still the manifest weight of the evidence proves that plaintiff, at the time of the accident and just before it, was guilty of contributory negligence that proximately contributed to the accident. We are satisfied that this contention is a meritorious one, but as this case may be tried again we refrain from commenting upon the evidence.

The judgment of the Circuit court of Cook county is reversed, and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D., 1948

THOMAS E. OVERBAY,

Plaintiff-Appellant,

vs.

BOARD OF FIRE AND POLICE
COMMISSIONERS OF THE CITY
OF JOLIET, ILL., et al.,
ADMINISTRATIVE REVIEW, et al.,

Defendants-Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY,
ILLINOIS.

339 I.A. 2

Per Curiam:

On or about March 19, 1947, appellant, Thomas E. Overbay, was elected to the office of Chief of Police of the City of Joliet and since August 10, 1948, he was the duly appointed, qualified and acting Chief of Police of that city. On June 20, 1947, written charges seeking his removal from that office were filed with the Board of Fire and Police Commissioners of said city and that board after notice and a full hearing as provided by law, entered an order removing him as Chief of Police. On November 6, 1947, Overbay filed, in the Circuit Court of Will County, his complaint under the provisions of the Administrative Review Act (Ill. Rev. Stat. 1949, Chap. 110, Secs. 264-79, inc.) to review the decision of the board. The amended answer of the

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not (11. 11. 1951) ... review the decision of the board.

board consisted of the record of the proceedings had before the board pertaining to the charges against Overbey. Upon a hearing before the Circuit Court, the decision of the Board of Fire and Police Commissioners was affirmed, and the record is brought to this Court for review by Ernest E. Overbey under Section 13 of said Act.

In its order discharging appellant from the police department of the City of Beloit the board found that for a period of approximately four years commencing in the year 1944, appellant failed and neglected to carry out regularly scheduled inspections of police cars, to direct his subordinates that, as Chief of Police he never interfered or caused to be interfered any instruction of any kind for new members taken into the department; that he never called any meetings of the various departments under his administrative control or attempted to co-ordinate the work of the several departments; that because of the lack of such co-ordination, the captains of police were unfamiliar with the progress or steps taken in important pending criminal cases; that during his tenure as Chief of Police he lacked confidence in the entire department, and there was a complete lack of confidence on the part of the entire police force in the leadership and policies of Overbey as its Chief; that during his tenure as Chief he always maintained a sullen and belligerent attitude toward his subordinates in the department and on numerous occasions he unnecessarily and unjustifiably threatened to prefer charges against his subordinates with the Board of Fire and Police Commissioners; that as a result thereof, he created in them a sense of fear and apprehension; that he unjustifiably and unnecessarily encouraged citizens to prefer charges against his subordinates in the police force, which tended to destroy confidence in the leadership of the Chief to such an extent that the efficiency

of the entire department was adversely affected; that during the time William Daggett was filling a probationary status and acting as a rookie policeman, he solicited Daggett to act as a secret informant with respect to matters in the police department; that during his entire tenure as Chief of Police, he conducted and threatened to conduct raids without first obtaining search warrants as required by law; that on October 4, 1946, in the case of Trans-American Publisher and News Service, Inc., v. Overbey, et al, the Circuit Court of Will County rendered a decree perpetually enjoined him from pursuing such a course of conduct, and at the time said decree was entered, the presiding Judge of said Court testified and condemned him and among other things stated to him in open court that he was guilty of the use of Hitlerian or European methods in his conduct as Chief of Police of the City of Joliet.

The Board of the Board of Discharging Applicants also found that the Board in July, 1947, directed him to take steps to promote a more harmonious police department but that he failed to obey that order and made no effort to comply therewith; that he also failed to comply with an order of the Commissioner of Public Health and Safety of the City of Joliet directing him to act in an executive capacity, and to allow the detail work of the department to be done by the men who ordinarily and customarily should handle those details; that under the guise of investigating a criminal case, with regard to which there was no reasonable cause to believe that one Lucy Rapson had any information in connection therewith, he made a personal call upon her in an effort to obtain information with respect to the activities of the Commissioner of Public Health and Safety; that the police

department, under the leadership of appellant, was devoid of morale, discipline and efficiency, and during all this time he was Chief, his conduct was detrimental to the discipline and efficiency of the service to such an extent that the police department of the City of Joliet had lost the respect of the community.

The order specifically found that appellant had on numerous occasions violated rules four, fifteen, twenty-four, thirty-four and fifty-five of the Rules and Regulations of the Board. That appellant had caused the members of the department such as to be in a position to make a sworn statement which will result in filling charges with the Chief of Police; that no member of the department shall conduct himself in a manner unbecoming a police officer and a gentleman or in any way that shall bring discredit to the department; that no member of the department shall perform his duties in an ^{manner} negligent or neglect the performance thereof and that all police officers shall be subject to all Federal and State laws, ordinances of the City of Joliet and department rules and regulations as decreed by the Chief of Police pertaining to and affecting police officers and the general rules of the Board of Fire and Police Commissioners.

The hearing before the Board consumed seven days. The testimony of the transcript of the/ forty-five witnesses who testified consists of more than eight hundred typewritten pages. Appellant was present at all the hearings and represented by able counsel. At the conclusion of the hearing in the trial court the judge took the cause under advisement and thereafter filed an opinion of twenty-two pages, which discloses that the case received the careful and studious consideration of the trial court.

It is insisted by Counsel for appellant that the judgment appealed from should be reversed, because the findings of the Court are manifestly against the weight of the evidence

deposition, in the last of the deposition, was given at the trial, and the jury was instructed to consider the evidence in the light of the law, and to return a verdict accordingly.

The jury returned a verdict in favor of the plaintiff, and the court granted judgment for the plaintiff. The defendant appealed from the judgment, and the court granted a writ of certiorari to the Supreme Court.

The Supreme Court affirmed the judgment of the trial court, and the defendant's appeal was denied. The court held that the evidence was sufficient to support the verdict, and that the trial court had not committed any error.

The court further held that the evidence was sufficient to support the verdict, and that the trial court had not committed any error. The court affirmed the judgment of the trial court, and the defendant's appeal was denied.

and a finding of the trial court. It is insisted by counsel for appellant that the judgment should be reversed, because the findings of the Court are manifestly against the weight of the evidence.

It is insisted by counsel for appellant that the judgment should be reversed, because the findings of the Court are manifestly against the weight of the evidence.

and that there is no substantial evidence in the record to support any of the charges preferred against appellant. It is also insisted that the court, considered non-expert opinions of the several witnesses who testified in support of the charges against the appellant to the effect that appellant did not have any confidence in his men, and that his men did not have confidence in him, that there was dissension and lack of harmony among the members of the force, that the police looked up to him as a tyrant, that appellant was the cause thereof and that he lacked the qualifications of a competent Chief of Police.

and the trial court found

The record discloses/that the police force of which appellant was Chief, consisted of fifty-five members. That at the time the charges were preferred against appellant and for several years prior thereto appellant did not command the respect and confidence of the men, nor the respect and confidence of the Commissioner of Police and Mayor of the City of Detroit; that there was violent friction between appellant and his men; that there were two factions in the Police Department, the Chief on one side and the other members of the force on the other; that there was a feeling of distrust by the men toward their Chief and a feeling of distrust by the Chief toward his men; that there was an utter lack of confidence between the factions; that the Chief had no inspections of uniforms, equipment or guns and did not conduct any period of instruction for the use of firearms and other weapons; that no instruction was ever given new members taken into the police department; that no effort was made by appellant to co-ordinate the work of the various departments under his control; that no meetings of the department heads were ever held to discuss problems confronting the several departments; that policemen with the rank of Captain were not kept informed of the development in important pending criminal cases; that

appellant handled such matters himself personally and ignored the Captains; that there was a lack of confidence by the members of the force in the Chief, as Chief, and as to his administrative procedures and policies; that, without justification he threatened to prefer charges against his subordinates with the Police Board and thereby created a sense of fear and apprehension on the part of such subordinates and they felt appellant was not interested in their welfare; that appellant took no interest in endeavoring to solve the many problems that arose in the administration of the Police Department involving individual policemen, who may or may not have known what their individual rights and duties were; that in contests between citizens and the Police Department appellant encouraged the citizens to prefer charges against his men, rather than to attempt to mediate the difficulties without going before the Board; that it became known to the Court that appellant had endeavored to secure the services of one of the policemen as a secret informant against the other policemen; that appellant conducted raids upon property without complying with the law in first obtaining search warrants, unless they were; that he interfered in the detail work of the men of the Department, who ordinarily and customarily handled details, in violation of an order of the Council of Police Health and Safety; that the discipline and efficiency of the Police Department was in the descending line and that appellant was not possessed of the proper degree of leadership to enlist the support of his men in carrying on the work of the Department.

The trial court further found that appellant had violated rules 4, 13, 28, 34, and 55 above referred to and concluded that the findings of the Board were not manifestly against the weight of the evidence but were substantially supported by the evidence.

appellant handled and sent out all correspondence.

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After an exhaustive review of the evidence found in this record and the applicable principles of law the trial court said: "It goes without saying that a police force in a city as large as Joliet must have discipline--morale--confidence in its chief--co-ordination of its departments and adherence to lawful methods in discharging police duties and in the suppression of crime. The evidence does not show that this police department was possessed of such elements under the plaintiff. Right or wrong, the chief pursued a policy as chief, that has produced a conflict in the Police Department that has lowered its efficiency and its morale. As a leader, the chief was unfortunate in not displaying those attributes and characteristics which, though they may not endear men to a leader, do command the respect and confidence of his inferiors. The safety of the persons and property of 100,000 people are affected by the efficiency of this Police Department. It seems to me the best the chief has been able to do in his defense has been to present a debatable question of fact, and that is not enough to reverse the findings of the Board and to overcome the mandate of the law that the findings of the Police Board on questions of fact shall be held to be prima facie true and correct."

Drezner v. Civil Service Commission, 398 Ill., 219 was a proceeding brought under the provisions of the Administrative Review Act, and it was there stated (pp. 227-228) that the Act does not purport to give a reviewing court the right to reweigh the evidence, still it is the duty of the court to determine if the findings of the administrative agency are borne out by the evidence and whether or not the findings are against the manifest weight of the evidence or if there is substantial evidence in the record to support the findings. The court further stated (page 231) that when a complaint is filed under that act its provisions are meant to be followed in entirety and not in any

After an exhaustive review of the evidence found in this record and the applicable principles of law the trial court said: "It goes without saying that a police force in a city as large as Detroit must have a large number of officers in its chief--department of its force and in the apprehension of criminals in almost every police district and in the apprehension of crime. The evidence does not show that this Police Department was possessed of such a large number of officers. Right or wrong, the chief--department of police in Detroit, that has conducted a conflict in the Police Department that has lowered its efficiency and its morale. As a result, the force was ineffective in not displaying these activities and a necessary chief, though they may not enhance men to a force, to conduct the respect and confidence of the citizens. The police are not properly trained and prepared at 100,000 people are affected by the activities of this Police Department. It seems to me that the chief of the Police Department is not a defense has been of witness to the fact in question of 1925, and that is not enough to reverse the findings of the court and to overcome the finding of the fact that the findings of the Police Board on questions of fact shall be held to be the true facts true and correct."

Exhibit A. Civil Rights Commission, 253 Ill., 219 was a proceeding brought under the provisions of the Administrative Review Act, and it was held (pp. 253-254) that the Act does not purport to give a reviewing court the right to reverse the evidence, still it is the duty of the court to determine if the findings of the administrative agency are borne out by the evidence and whether or not the findings are against the manifest weight of the evidence and if there is substantial evidence in the record to support the findings. The court further stated (page 251) that when a complaint is filed under this act the provisions are meant to be followed in entirety and not in any

perfunctory manner, that it is the duty of the Judge of the Court in which the proceeding is pending to hear the arguments of counsel and to review the proceedings thoroughly before making his decision. In the instant case, this was done and the outlined procedure carefully followed.

The trial court found that there were two factions in the Joliet Police Department, appellant at the head of one faction and the other fifty-four members of the department constituted the other faction. The court also found that appellant violated rule fifty-five of appellee Board in making searches without first obtaining required legal warrants; that no inspections of uniforms or equipment were ever made and no regular scheduled meetings of the Chief with his captains, sergeants or patrolmen and no discussion of the problems or situations which the department, as a whole, must confront, were ever held. It is elementary that no police force can be effective without leadership on the part of the Chief, and the trial court found that appellant lacked the necessary qualifications of a capable leader. ✓

The conditions found by this record cannot exist in an efficient police force. Appellant was the only witness to testify in his behalf. We have carefully considered his testimony as abstracted as well as all the other evidence found in this record. The written charges filed with appellee in this case were preferred by one of the city commissioners, and by a captain and by a patrolman in the department and by a retired policeman. Upon the hearing before the Board, thirty-one members of the department, including captains, sergeants and patrolmen testified in support of the charges. We agree with the trial judge that some of the items of evidence are trivial but a consideration of all the evidence

leads to but one conclusion and that is that the order appealed from is the only order warranted by the evidence and that order must be affirmed.

Order Affirmed.

leads to but one conclusion and that is that the order cancelled
from is the only order returned by the customer and that order
must be affirmed.

Account No. 111111

44888

FRANK BINIAKIEWICZ and JOSEPHINE
BINIAKIEWICZ,

Appellants,

v.

JOHN WOJTASIK,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

333 I.A. 574²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued for personal injuries and property damage to an automobile. Defendant filed a counterclaim to recover for property damage to his automobile, arising out of a collision between the two automobiles at the intersection of Western Boulevard and Archer Avenue in Chicago, which was then controlled by traffic control signals. A trial with a jury resulted in verdicts of not guilty as to the original and cross complaints and judgment entered thereon, from which plaintiffs appeal.

There was a sharp conflict in the evidence, directly bearing upon the question of the alleged negligence of the defendant and that of plaintiffs in the operation of their cars.

The grounds for reversal are the misconduct of defendant's counsel, seriously prejudicing the jury against plaintiffs, and the giving of an erroneous instruction. Where, as in this case, there is a sharp conflict in the testimony, it is necessary that the jury be correctly instructed, and that the trial be free from such misconduct

2.

of counsel as would warrant a reversal.

One of the witnesses for the plaintiffs was a police officer, not an eyewitness to the accident. He investigated and made his report of the accident, and testified after refreshing his recollection from the report. Upon cross-examination counsel for defendant asked the police officer to produce a copy of his report, which he did, and counsel, holding the report in his hand, asked the following questions of the police officer:

"Mr. Jacobs: And you in the line of your duty held the car belonging to Mr. Biniakiewicz for the damage done to the Park Board's property?

"Mr. Brooks: I object to anything--what the officer did holding the car as to Park Board property. That litigation is not in point here.

* * *

"Mr. Jacobs: Well, did you learn that Mr. Wojtasik's view was obstructed by the streetcar?

"Mr. Brooks: That is objected to, if the Court please.

"The Court: Objection sustained.

"Mr. Jacobs: Now, from your investigation, talking to the driver, Frank Biniakiewicz, did you determine that Mr. Wojtasik--that there was apparently no improper driving on the part of Mr. Wojtasik?

"Mr. Brooks: If the Court please, I object to Counsel's question. I move a juror be withdrawn.

"Mr. Jacobs: I am asking, from this plaintiff, did he learn anything.

"The Court: Strike out the question. I instruct the jury to disregard it.

"Mr. Jacobs: Well, isn't it a fact that what Mr. Frank Biniakiewicz told you was to the effect that Mr. Wojtasik was driving his automobile properly?

"A. He didn't say anything about how he was driving.

3.

"Q. Well, did you make out a report?

"Mr. Brooks: I again object to the question counsel asked and move that the answer be stricken as calling for a conclusion of the witness and invading the province of the jury; and secondly, I object to it on the ground it is improper conduct on the part of counsel, and I can show you counsel's own case.

"The Court: I will sustain your motion to strike it. The jury will disregard it."

In his final argument to the jury, defendant's counsel said in part to the jury:

"I say, and I believe it to be a fact, that through a very fortunate circumstance, there these people were most fortunate and they should give their thanks to God that they were not injured and they were not, instead of being in here with a lawsuit some four years, almost, after this occurrence. And I want to say one thing about that. This is not new that counsel wants to tell about him being in service. Well, so be it. But we are not wasting our time telling you about Mr. Wojtasik's military service nor his two son's military service."

"Mr. Brooks: Now, if the Court please.

"The Court: Yes.

"Mr. Jacobs: I thought it was very poor taste that twice Counsel tells us about--

"The Court: Two wrongs don't make a right. Objection sustained.

"Mr. Brooks: I can say a lot about things, too, Judge, and I don't care to go into it. I didn't say I was in Service, Counsel. I am proud that I was, however.

"The Court: The jury will disregard the service of the plaintiffs' lawyer and disregard the service of the defendant and his two sons.

"Mr. Jacobs: It certainly should have nothing to do with this case.

"The Court: That's right."

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The questions asked the police officer, while counsel was holding the police report in his hand, were a clear effort to get before the jury, indirectly, what he would not be permitted to directly put in evidence. To ask the officer what he determined from his investigation would be a clear invasion of the province of the jury. Asking him whether he did come to any determination is equally improper. It was highly prejudicial, since it conveyed to the jury an impression that the officer's investigation, probably adverse to plaintiffs and recorded in the report, was something the plaintiffs tried to keep from the jury. In Gordon v. Checker Taxi Co., 334 Ill. App. 313, at p. 318, we said:

"Innuendoes involved in such questions are sometimes more damaging than an effort to prove the impeaching facts. * * * the prejudicial effect springing from such questions cannot always be overcome, and results in an unfair trial to a plaintiff. * * * We cannot place our stamp of approval upon such trial practice. It does not result in a fair trial according to settled standards, and a verdict so obtained should not be permitted to stand."

Likewise, the questions put to the police officer, concerning the holding of plaintiffs' automobile for damage to Park property, conveyed the prejudicial insinuation that plaintiffs must have been responsible for the damage to the Park property resulting from the manner in which plaintiff operated his automobile, a collateral issue, not involved in the case. The sustaining of objections to such prejudicial questions does not cure the evil. Bale v. Chicago Junction Ry. Co., 259 Ill. 476. As was said in Bishop v. Chicago Junction Ry. Co., 289 Ill. 63, at p. 70:

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"When intelligent counsel persists in conduct which he knows may result in setting aside the verdict of the jury if he secure one, he is thereby deliberately taking chances with his client's rights."

The statement of defendant's counsel in final argument to the jury was also unwarranted and prejudicial. Plaintiffs' counsel had not stated to the jury that he was in the military service. He merely referred to the fact that he was not in this country in 1945. It is possible that it carried an inference that he may have been in the military service, but he did not say so. It, therefore, did not justify counsel telling the jury that defendant and his sons were in the military service, of which there was no evidence in the record, and which could not properly be in evidence. We said in Wellner v. New York Life Ins. Co., 331 Ill. App. 360, at p. 365:

"The defendant is entitled to a fair trial, free from prejudicial conduct of counsel, who in an argument undertakes to supply facts, or an inference favorable to the plaintiff not based upon any evidence in the record."

Complaint is made as to instruction No. 8, given for the defendant. The instruction reads:

"The Court instructs you that if you believe from the evidence that immediately before the accident in question the automobile of the defendant, John Wojtasik, had been standing still at or near a traffic light showing red, on the west side of Western Boulevard, and that when the automobile of said Wojtasik entered said intersection said traffic light showed the green or 'go' signal; and if you further believe from the evidence that the defendant, John Wojtasik, used reasonable and ordinary care and caution in driving his car through said intersection at the time and place in question, then you should find the defendant, John Wojtasik, not guilty."

This was a peremptory instruction, directing a verdict of not guilty upon the hypothesis stated in the instruction. It did not correctly state the law applicable to the instant case. Plaintiffs alleged in their complaint a violation by defendant of Section 32.(a) of the Uniform Traffic Act, ch. 95-1/2, par. 129, Ill. Rev. Stat. 1945. There was evidence for plaintiffs that they entered the intersection with the green light in their favor, and that it changed to amber after they were in the intersection near the streetcar rail on Archer Avenue. There was other evidence plaintiffs entered on the amber light. The instruction in question would exclude the benefit plaintiffs are entitled to under that section of the statute. The Supreme Court in Schneiderman v. Interstate Tr. Lines, 394 Ill. 569, at p. 579, said:

"The statute (sec. 32(a) of the Uniform Traffic Act,) prescribes the rule by which traffic is moved at street intersections controlled by automatic stop-and-go lights. It directs that when the color green is exhibited, the traffic facing it shall move forward into the intersection. Such right of way, however, is subject to the provisions that the one advancing into the intersection with the green light 'shall yield the right-of-way to other vehicle * * * lawfully within the intersection at the time such signal is exhibited.' The second division of paragraph (a) prescribes the duty of the driver who approaches the intersection when the yellow light following the green is exhibited. It directs that when the yellow light flashes in front of him, he shall stop before entering the nearest cross-walk at the intersection 'but if such stop can not be made in safety, a vehicle may be driven cautiously through the intersection.'"

The judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Tuohy, P. J., and Niemeyer, J., concur.



44866

METROPOLITAN LIFE INSURANCE CO.,)
a Corporation,)
Appellee,)
v.)
JOSEPH M. COONEY, individually)
and as executor of the Estate of)
Hjalmar Charles Holmgren,)
Appellee.)
On Appeal of ELMORE K. AHLBERG,)
Appellant.)

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

127
339 L.A. 575

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Mrs. Elnore K. Ahlberg, original beneficiary of seven insurance policies on the life of Hjalmar Charles Holmgren, her stepfather, appeals from a judgment directing the payment of \$1,791.85, the proceeds of five policies, to her brother Joseph M. Cooney, the alleged beneficiary under five applications for change in beneficiary executed by the insured a week before his death. The insurer filed an interpleader and paid to the clerk of the court the proceeds of the five policies in dispute.

Cooney procured from Mr. Vezina, the agent of the insurer who collected the premiums on the policies, blank applications for change of beneficiary. On one Vezina inserted the number of the policy and the word "stepson" in the space on the application for "Relationship to Insured." On May 3, 1947 the insured signed the applications in the presence of his attorney, who, as notary public, took his acknowledgment of the application in which the number of the policy had been inserted, and signed as a witness to

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the signature of the remaining applications. At this time all the applications were blank except for the insertions above noted and the signature of the insured. May 5, 1947 the insured was taken to the hospital, where he died on May 10th. On May 6th Cooney claims to have delivered the blank assignments, with the signature of the insured acknowledged and witnessed, to Vezina. One of the applications when introduced in evidence was filled out with the policy number, name of new beneficiary, his relationship to insured, his age and residence. The record is silent as to when or by whom these matters were inserted in the application. There were also introduced in evidence as defendant Cooney's exhibits two inter-office communications from Fanning, the manager of the Normal Park, Illinois district of the insurer, in which the insured lived, in which it is stated that Cooney called at the office of the company with the change of beneficiary forms on or about May 16th. Fanning, called as a witness by Ahlberg, testified that he saw the applications on or about May 16th. There is no evidence of any act or word of the insured indicating to whom he wished to change his insurance, except his signature on the one application on which Vezina had printed the word "stepson." During a discussion between the court and counsel the following colloquy occurred: "The Court: *** There were no particular statements as to whom he (the insured) wanted to give the insurance or anything of that kind? Mr. Chancellor (attorney for Mr. Cooney): No, no, nothing of the kind." There is no legitimate evidence in the record indicating to whom the insured wished to change his policies. No reason is shown why "

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the applications were not filled out with the information in the forms as to the name of the beneficiary, his relation to the insured, age and residence at the time the applications were signed by the insured. Cooney had possession of the applications, but this possession did not give him implied authority to insert in the applications the information and data requested of but unanswered by the insured. The rights of the claimants to the proceeds of the policies were fixed at the death of the insured. The facts presented do not bring the case within the well established rule that where the insured has done all within his power to make the change, and ministerial acts remain to be performed by the insurer, the intended change will become effective. It is governed by the case of Young v. American Standard Life Ins. Co., 398 Ill. 565, where the failure of the insured to give the date of the signing of the application for change of beneficiary and the relationship to him of the proposed beneficiary rendered the application ineffective.

The judgment is reversed and the cause remanded with directions to enter judgment in favor of appellant for the proceeds of the five policies in controversy.

REVERSED AND REMANDED WITH DIRECTIONS.

Feinberg, J., concurs.
Tuchy, P.J., took no part.

44881

RALPH A. RADNY,
Appellant,
v.
MARY RADNY,
Appellee.

MARY RADNY,
Appellee,
v.
RALPH A. RADNY,
Appellant.

128
APPEAL FROM
SUPERIOR COURT
COOK COUNTY

3381.2.261

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order directing him to pay to defendant \$300 for her temporary attorney's fees and \$13 for costs expended by her in a divorce action.

Plaintiff filed a verified complaint charging defendant with cruelty. On the following day defendant instituted an action for divorce, filing a verified complaint charging cruelty. These suits were later consolidated. The parties will be referred to as plaintiff and defendant as in the first suit. On defendant's motion for temporary fees and costs filed in the first suit the order appealed from recited that the cause came on for hearing on defendant's petition, and "the court, finding that it has jurisdiction of the parties hereto and the subject matter and being advised in the premises and the plaintiff appearing in open court," ordered

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the payment of attorney's fees and costs. Shortly thereafter, plaintiff filed a verified petition to vacate the order, alleging "that no testimony was taken at said hearing in regard to the merits of the defendant's motion for temporary attorney's fees and costs and that no preliminary hearing was conducted to ascertain whether it was probable that your petitioner could prove his charge as provided by law and contrary to Par. 16 of Chapter 40 of Smith-Hurd Ill. Annotated Statutes." No reply to this petition was filed. The court denied the motion to vacate the order. Defendant has not followed the appeal.

The order, as heretofore noted, does not recite the hearing of evidence on defendant's motion. Section 15 of the Divorce Act provides "that hereafter in divorce proceedings in which the wife seeks alimony during the pendency of the suit or attorney's fees or suit money before the case **has** been finally adjudicated and the husband files a complaint or counterclaim in such divorce suit, making charges, which if sustained by proof, would entitle him to a divorce decree, the court shall have no jurisdiction to allow such temporary alimony or attorney's fees or suit money until it has conducted a preliminary hearing to ascertain whether it is probable that the husband can prove such charges, and if the court finds that it is reasonably probable that the husband can sustain such charges, such temporary alimony shall be denied and the question of the allowance of attorney's fees and the suit money reserved until the final hearing of the case." The court having

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failed to comply with the foregoing provisions, it was without jurisdiction to enter the order. This order is reversed and the cause remanded for such further proceedings, if any, the parties may desire in conformity with the statute and this opinion.

REVERSED AND REMANDED.

Tuohy, P. J., and Feinberg, J., concur.

44891

JOHN WILCZEWSKI and STEPHANIA
WILCZEWSKI,

Appellants,

v.

AMERICAN CENTRAL INSURANCE
COMPANY,

Appellee.

APPEAL FROM

MUNICIPAL COURT OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order striking their second amended complaint to recover damages sustained by reason of a fire in premises alleged to be covered by an insurance policy issued by defendant.

This complaint alleges that one Lillian Beutler was an insurance broker, duly licensed and bonded; that Geo. Hermann & Co. were agents for the defendant and had knowledge that Lillian Beutler was an insurance broker; that in 1947 plaintiffs applied to Beutler for fire insurance covering property owned by them; that she secured a fire insurance policy issued by defendant through its agents; that the policy was delivered to Beutler and by her to plaintiffs, who on May 5, 1947 paid the premium demanded (\$81.60) to Beutler; that while the policy was in full force and effect, on July 31, 1948, a fire occurred in the premises resulting in damages amounting to \$480; that defendant has at all times refused to pay the fire loss, claiming that the policy had been canceled for nonpayment of premiums for the reason that Beutler did not remit to defendant the premiums collected by her from plaintiffs.

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The statute (Ill. Rev. Stat. 1947, chap. 73, par. 583) defines a broker as follows: "The term 'broker', as used in this Act, means any person, partnership, association or corporation, who or which for money, commission, brokerage or anything of value, acts or aids in any manner in the solicitation or negotiations, on behalf of the assured, of contracts of any of the kind or kinds hereinabove enumerated." Although the broker may, with the consent of both parties, become the agent of the insurer and the insured, in the absence of allegation and proof to that effect he is deemed to be the agent of the insured. France v. Citizens Casualty Co.; 400 Ill. 55; Tri-City Transportation Co. v. Bituminous Casualty Corp., 311 Ill. App. 610. Plaintiffs have not alleged any fact tending to show that Beutler was acting for and on behalf of defendant in receiving the premium from plaintiffs. They do not allege that this premium was ever paid to or received by the defendant.

The judgment is affirmed.

AFFIRMED.

Tuohy, P. J., and Feinberg, J., concur.

45006

ELLEN HOLT,

Appellee,

v.

ANTIOCH ENGINEERING COMPANY,
a corporation, and LAWRENCE
WAREHOUSE COMPANY, a corpora-
tion,

Appellants.

130
A
APPEAL FROM
MUNICIPAL COURT OF CHICAGO

3391A-577

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Lawrence Warehouse Company appeals from a judgment of \$610 and costs entered against it in an action for use and occupation of premises occupied by it as a sublessee after the termination of the lease.

Plaintiff leased the premises in question to the All-American Electrical Mfg. Co., for a term expiring April 30, 1948; September 18, 1947 the lessee, with lessor's consent, subleased the premises to defendant for the purpose of warehousing certain electrical supplies; in March 1948 the original lessee went into bankruptcy and on March 18th its assets were sold to the Manufacturers' Trading Corporation of Cleveland, Ohio, which on the same day sold them to the Antioch Engineering Company; defendant issued its nonnegotiable warehouse receipts on the electrical goods in its custody to secure payment of the purchase price by the Engineering company and later made delivery to the Engineering company upon payment of the full purchase price of the goods. Plaintiff was advised of these facts. On expiration of the original lease plaintiff demanded possession

2.

and on May 28, 1948 judgment for possession was entered and writ of restitution stayed until June 11, 1948, the order providing for the payment by defendant and the Engineering company, whose liability is not involved on this appeal, for use and occupancy of the premises until same were surrendered. June 11, 1948 defendant made final delivery of the goods covered by the warehouse receipts to the Antioch Engineering Company and possession of all the premises covered by the lease was surrendered prior to June 30, 1948.

The only point urged on appeal is that in holding possession of the goods purchased by the Engineering company, defendant was acting as its agent, and this fact being known to plaintiff, defendant's principal, and not defendant, was liable. This contention cannot be sustained. Defendant was in possession of the premises as a sublessee and therefore liable to plaintiff for rent during the term of the sublease and for use and occupation after the expiration of the lease. It was also liable for such use and occupation under the order permitting it to remain in possession after the entry of the judgment for possession.

The judgment appealed from is affirmed.

AFFIRMED.

Feinberg, J., concurs.
Tuohy, P. J., took no part.

No. 10366

In the
APPELLATE COURT OF ILLINOIS
Second District
October Term, A. D. 1949

339 I.A. 577²

JOSEPHINE INDORANTE,	)	Appeal from
)	
Plaintiff-Counterdefendant,	)	Circuit Court
Appellant,	)	Kankakee County.
)	
vs.)	
)	
SAM INDORANTE,	)	Honorable
)	
Defendant-Counterclaimant,	)	C. D. Henry,
Appellee.	)	Judge Presiding.

BRISTOW, J. -- On October 29, 1947, the plaintiff, Josephine Indorante, brought a suit for separate maintenance in the Circuit Court of Kankakee County wherein it was charged that her husband, Sam Indorante, was guilty of extreme and repeated cruelty that rendered her life so unbearable that it became necessary for her to leave home in September, 1948. The defendant denied these allegations in his answer and filed a counterclaim wherein he sought a divorce upon the grounds of desertion. These issues were tried without a jury, and, on February 5, 1949, a decree was entered dismissing plaintiff's

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CLERKS

County Clerk - J. H. ...

DEPUTIES

2. The second part of the document is a list of the names of the persons who have been appointed to the various offices of the County of Los Angeles, California, for the year 1900.

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complaint for want of equity, granting the defendant a divorce upon the counterclaim, and denying plaintiff any rights in defendant's property at the time of the trial. The plaintiff prosecutes this appeal, seeking to reverse this decree.

The evidence shows that Josephine and Sam were married on July 27, 1925, and thenceforth to September, 1943 lived and cohabited together as husband and wife; that there were three children born to this union, Vincent and Seraphine, who have reached their majority and married, and Cecelia, a girl sixteen years of age living with her mother. Vincent Indorante, the oldest, testified that the plaintiff was a good mother, kind and attentive to their needs. Seraphine Chaney, the married daughter, testified that her mother was clean, and attended to the wants of the children very well. All three children testified that there was more or less discord and bickering between their father and mother, but nothing of a serious or aggravated nature. The son, Vincent, testified that the only time he ever saw his father mistreat his mother was sometime between 1929 and 1933 when he was very young, and said, "It was just a slap." Seraphine did not remember ever seeing her father slap, push, or strike her mother. To like effect, Cecelia testified that she had never seen her father strike her mother.

Josephine Sineni testified that in the year 1937, defendant slapped plaintiff several times in her presence and in the presence of the three children. Significantly, none of the three children corroborated this testimony. The evidence clearly shows that both parents were good to their children, and that they provided them with the necessities and comforts of life quite abundantly.

Apparently the plaintiff and defendant were getting along fairly well together until 1937, when she decided to enter into the millinery business. At first she conducted this business in their home, and then she moved it down town. Then, in September, 1943, which was about a year and a half after she moved her business down town, she left her home and took up her residence elsewhere. The record very clearly indicates that on many occasions Sam sought to have Josephine return home. He wrote her to do so, and frequently sent one or the other of his children to see their mother and persuade her to return to his home. The defendant testified that, on one occasion when she refused, she said that she was deeply in love, and that, consequently, she couldn't come back. The only excuse that Josephine offers in reply to this testimony is that when Sam asked her to return to him, he laid down a certain set of rules as a guide for her conduct if she should come home, and said that unless she lived up to this strict code, she need not return. The record also discloses the testimony of several neighbors and three former employees at the tavern and lunchroom. They all testified that Sam and Josephine got along well together, and that they observed in their relationship nothing that would *indicate* ~~induce~~ friction or unusual incompatibility. The defendant denied in his testimony any and all acts of cruelty.

From 1925 to 1937, the plaintiff and defendant were in the lunchroom and tavern business in partnership with Mr. and Mrs. Cuzzo, the parents of the plaintiff. Both the plaintiff and defendant, apparently, applied themselves very industriously in the conduct of this business, making it a successful enterprise from a financial standpoint.

It is claimed by the plaintiff that the defendant is now possessed of several real estate properties which have considerable

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value, and that this accumulation of property is the result of her efforts and investments of monies that she assisted her husband in acquiring. The record does not sustain this contention. Defendant's testimony showed that at the time defendant's wife left him, he owned real estate valued at \$16,000.00, which was held in joint tenancy with his father-in-law, and when this property was sold in 1945, \$12,000.00 was paid to the plaintiff and her father in settlement of their interest in the premises.

It appears that the plaintiff and her parents received their respective shares in the premises and business, which settlement took place something like two years after the parties had separated, and that each side was represented by able counsel. The evidence clearly shows that all of the property owned by the husband at the time of the instant hearing had either been inherited by him from his brother or had been the result of his own efforts, and that his wife had contributed nothing in the acquisition of this property. The law would not sustain any claim by a wife to any interest in such property. (Gilbert vs. Gilbert, 305 Ill. 216).

We are of the opinion that the chancellor was correct in his views that Sam Indorante made every effort in good faith to have Josephine resume marital relations with him, and that when she refused to do so she was guilty of desertion. (Garvey v. Garvey, 282 Ill. App. 485). We are further of the view that the trial court in weighing the conflicting testimony on the question of extreme and repeated cruelty did not err when he determined that the plaintiff had failed to sustain her charge. This cause was heard by the court without a jury, and a reviewing tribunal is not permitted to disturb its findings unless it

appears they are manifestly wrong. Counsel for appellant stated in their brief that the paramount problem presented in this appeal is that the decree entered herein is not supported by the evidence. With this contention we cannot agree. It is our considered judgment that the decree entered in this case is a correct one.

DECREE AFFIRMED.

appears they are satisfied with the results of the trial in their own minds. The fact that the jury has returned a verdict of guilty is evidence of the fact that the jury has been satisfied with the evidence. The fact that the jury has returned a verdict of guilty is evidence of the fact that the jury has been satisfied with the evidence. The fact that the jury has returned a verdict of guilty is evidence of the fact that the jury has been satisfied with the evidence.

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333-45789

Honorable
James V. Bartley,
Judge Presiding.

One of appellees, Harlow G. Fredrick, filed an affidavit for summary judgment, stating that appellant unlawfully remained in possession of premises after the termination of the one year lease. A motion to strike the affidavit for summary judgment

was overruled. Thereafter appellant filed a counter-affidavit, which was as follows:

"That affiant was intimately acquainted with F. E. Fredrick and his son, Harlow G. Fredrick, for a great many years prior to F. E. Fredrick's death; that affiant resided in Joliet, Illinois and in the same neighborhood as that of the plaintiff. That for over ten years prior to the death of said F. E. Fredrick, the affiant was at his beck and call, practically every day taking him in affiant's automobile to various places in the City of Joliet, and to his farms, one located at Elwood known as the Blatt farm, and the other being the farm herein involved, for which said services affiant made no charges; that during said period of time the said F. E. Fredrick owned the farm herein involved; that one Harry Heitz was the tenant on said farm, for a period of about thirty-six years; that about the 1st of August, A. D. 1947, the tenant, Harry Heitz, decided to retire from farming, and on said date the said F. E. Fredrick, owner of the farm herein involved, requested the affiant to come to his home, informing him that he wished to discuss with him a matter of considerable importance to both; that affiant on said date went to the home of said F. E. Fredrick, and then was informed by F. E. Fredrick that his tenant, Harry Heitz, was quitting farming. That because of said fact, he wished affiant would become his tenant for the farm year beginning March 1, A. D. 1948; that at said session the rental terms were discussed and it was verbally agreed that said affiant was to work and occupy the farm as a tenant from year to year on a share rental basis, beginning March 1, A. D. 1948, said F. E. Fredrick stating that he expected affiant to remain the tenant there for a great many years and during the conversation referred to this farm as the farm of the affiant; that after the verbal agreement for the rental of

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the farm was agreed upon, the said defendant requested of F. E. Fredrick that he prepare a written lease for the said farm on the share rental basis, for a period of five years, giving as his reasons that he, the defendant, would be required to buy tools and machinery which would cost considerable and therefore wished to have absolute assurance that he would be the tenant on this farm for a period of at least five years. The said F. E. Fredrick then stated that he would instruct Attorney Frank J. Wise to prepare this written lease to said farm, for five years on a share rental basis, the same as that of the former tenant, Harry Heitz, and thereupon affiant agreed to occupy the farm as a tenant from year to year for at least a period of five years, commencing on March 1, A. D. 1943.

Affiant further states that F. E. Fredrick died very suddenly on October 31, A. D. 1947; that his son, Harlow G. Fredrick, the plaintiff herein, knew of the verbal agreement that existed between his father, the said F. E. Fredrick, and the affiant for the rental of said farm, and on several occasions during the summer of 1943 while coming to the farm expressed his willingness and desire that the wishes of his father be complied with and that the affiant occupy said farm as a tenant from year to year on a share rental basis; that on March 1, A. D. 1943, affiant moved onto the farm herein involved as a tenant and proceeded to cultivate and operate said farm as a tenant; that during the summer of 1943 the plaintiff, Harlow G. Fredrick, visited the affiant on said farm on several occasions while the barn and tool shed were being repaired, and on those occasions verbally agreed that affiant remain on the farm as a tenant from year to year and that he should have a written lease for a period of five years; that on one occasion when the said Harlow G. Fredrick visited the farm affiant

mentioned to him that he had heard rumors that the plaintiff himself wished to take possession of the farm, this the plaintiff denied, and during a conversation remarked that the making of these repairs would make farming more convenient and comfortable for affiant.

Affiant further states that on several occasions during the summer of 1948 he called at the office of Attorney Frank J. Wise inquiring about the written lease that he was to have prepared for affiant for the operation of the farm for a period of five years on a share rental basis; that said Frank J. Wise informed affiant that he would communicate with his client, Harlow G. Fredrick, who was in Florida, about the preparation and the signing of said lease for the farm and would notify affiant as soon as he received word from the plaintiff.

Affiant further states that he was led to believe from statements made by Harlow G. Fredrick, the plaintiff, that his father's wishes would be complied with and that affiant would be the tenant for said farm from year to year; that affiant relying upon those statements made by said plaintiff, during the last part of August and the forepart of September, 1948, ~~he~~ plowed approximately twenty acres of ground preparatory for planting corn for the farm year A. D. 1949, also removed from the buildings and fence lines rubbish, old wire, and rock, thereby improving the premises and making them more attractive.

Affiant further states that at no time did the plaintiff, Harlow G. Fredrick, notify or inform affiant that he was not to be the tenant for the farm year A. D. 1949; that the first notice affiant had of any kind that said plaintiff, Harlow G. Fredrick, wished the defendant to relinquish and surrender possession of the premises was on November 26, A. D. 1948."

mentioned to him that he had heard rumors that the plaintiff
himself wished to take possession of the farm, this the plaintiff
flatly denied, and during a conversation with the defendant that one of
of these rumors would make farming more difficult for the plaintiff
able for plaintiff.

At about the time that the defendant was in possession of the
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Thereafter, on March 2, 1949, he was served with a written notice demanding immediate possession. Motion to strike the counter-affidavit was made on the ground that such an oral agreement was unenforceable since it violated the Statute of Frauds. This motion was allowed by the court and judgment was entered in favor of appellees for possession of the farm.

Appellant prosecutes this appeal, relying upon the theory that past performance on his part obviates the application of the Statute of Frauds and that such a defense can be effectively pleaded in a law action.

In the case of Melburg v. Dakin, 337 Ill. App. 204, the court had occasion to consider this identical problem and sustained the theory advanced by the appellant herein.

Appellee in his brief contends that the allegations of past performance set forth in the counter-affidavit are frivolous and inconsequential. Giving consideration to all the authorities cited on this subject, we do not believe that we would be justified in holding that the pleading filed by appellant did not raise an issue of fact that should be submitted to a jury.

Therefore we are of the view the court erred in sustaining appellees motion to strike the counter-affidavit filed herein and in allowing appellees motion for summary judgment.

CAUSE REVERSED AND REMANDED.

Thomas, born in 1944, was arrested in 1964.

Notice demanding immediate release was received on 10/10/64.

Counter-espionage activities on the part of the FBI.

Agreement was made with the FBI on 10/10/64.

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Notice demanding immediate release was received on 10/10/64.

Counter-espionage activities on the part of the FBI.

5/12
over

Abstract
per telephone
2-22-50

General No. 10378

Agenda No. 23

In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1949

LYLE MONROE, Administrator
of the Estate of Joe R. Greer,
Deceased,

Plaintiff-Appellee,

vs.

ARTHUR AVERKAMP,

Defendant-Appellant,

and

UNITED MOVING AND STORAGE,
INCORPORATED, a Corporation,

Counterclaimant-Appellee,

vs.

ARTHUR AVERKAMP,

Counter Defendant-Appellant.

3391A. 338²

APPEAL FROM THE
CIRCUIT COURT OF
JO DAVIESS COUNTY.

Dove, J.

Lyle Monroe, as Administrator of the estate of Joe R. Greer, deceased, commenced this action in the Circuit Court of Joe Daviess County against the defendants Arthur Averkamp and United Moving and Storage, Incorporated, a corporation, to recover for the wrongful death of his intestate.

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See also *all* *covered*

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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The action grows out of an automobile-truck collision occurring on January 24, 1946, which involved the automobile driven by plaintiff's intestate, Joe R. Greer, and the pickup truck of the defendant Averkamp and the tractor trailer of the defendant United Moving and Storage, Incorporated. Arthur Averkamp will be referred to herein as appellant and the other defendant, United Moving and Storage, Incorporated, will be referred to as United.

The complaint consisted of six counts. Count one is directed against appellant and the substance of this count is that appellant, while driving his pickup truck in a westerly direction along U. S. Highway No. 20 near Galena, Illinois, negligently drove the same in such a manner as to cause it to collide with the tractor-trailer owned and operated by United which was proceeding in an easterly direction on the same highway; that as a result of said collision, the tractor-trailer of United obstructed both the east and west traffic lanes of said highway, all of which caused the automobile which was owned and operated by decedent, plaintiff's intestate, which was being driven also in a westerly direction, to collide with the tractor-trailer of United.

Count two is also directed against the appellant and realleges the same factual situation except that it charges that appellant drove his automobile over the center line of the highway contrary to Paragraph 151 of Chapter 95¹/₂ of The Revised Statutes of ^{the} State of Illinois. Count three was directed against the appellant, and charges that he was under the influence of liquor while operating his motor vehicle contrary to Paragraph 144

of Chapter 95½ of the Revised Statutes of this state, and alleged that as a result of being under the influence of said liquor, appellant wilfully and wantonly drove his vehicle across the center line of the highway and collided with the tractor-trailer of United.

Counts four and five are directed against United. Count four charges general negligence against United in the operation of its tractor-trailer, all of which caused it to collide with decedent's automobile, while Count five alleges that United operated its tractor-trailer at an excessive rate of speed and without being equipped with adequate brakes contrary to the certain designated statutory provisions. Count six is directed against appellant and United jointly and combines the various charges of negligence in the preceding counts.

All six counts of the complaint allege that plaintiff's intestate received injuries as a result of the collision between the automobile he was driving and the tractor-trailer of United; that his injuries resulted in his death on the day of the accident, and that the misconduct of the defendants, or one of them, or both jointly, was the proximate cause of the death of decedent.

United filed its answer denying the material allegations of the complaint as did also appellant and United filed its amended counterclaim in which it charged that appellant was guilty of negligence and of wilful and wanton misconduct in the operation of his vehicle at the time and place in question resulting in the tractor-trailer of United being damaged to the extent of \$1507.96. The second count of the amended counter-claim

was directed against appellant and also the plaintiff, as administrator, and jointly charged them with negligence and wilful and wanton misconduct in the operation of their respective vehicles, which negligence and misconduct resulted in the damage to the tractor-trailer of United in the sum aforesaid. Replies were filed and ~~after~~ the issues made by the pleadings were submitted to a jury for determination. There was also submitted to the jury ~~at the time of the trial~~ a special interrogatory, which was as follows: "Was the defendant, Arthur Averkamp, guilty of wilful and wanton misconduct in the operation of his automobile just before and at the time of the accident in question in this law suit?" The jury answered this interrogatory in the affirmative and returned a general verdict in favor of the plaintiff and against appellant for \$2500.00. Upon the issues made by the amended counterclaim and reply, the jury returned a verdict in favor of United and against appellant in the sum of \$1000.00. The jury also returned a verdict in favor of the plaintiff and against United on that portion of the amended counterclaim which was directed against plaintiff. After denying motions for a new trial and for judgment notwithstanding the verdicts, the trial court rendered judgment in accordance with said verdicts and the defendant and counter defendant, Arthur Averkamp, appeals.

The evidence discloses that the collision in question took place on January 24, 1946, on United States Highway No. 20 at a point approximately one-half mile west of the city limits of Galena, Illinois, at about eleven o'clock, P.M. This highway at the point of the collision runs in a general easterly

and westerly direction. About one hundred feet west of where the accident happened, the highway curves gently to the north. The tractor-trailer of United was being driven by Frank Baker, and he was accompanied by Francois Ladig, both men being employees of United. Their tractor was a Deage, and to it a Fruehauf trailer was attached. This tractor-trailer was being driven in an easterly direction at approximately thirty-five miles per hour. There were either four or five automobiles being driven along the highway in the opposite, or westerly, direction. The first west bound car passed the tractor-trailer. The second west bound vehicle, which was an International pickup truck, belonged to appellant. As it neared the tractor-trailer of United, it came over the black line into the east bound lane of traffic. This caused the driver of the tractor-trailer to drive off the paved portion of the highway and onto the shoulder of the road in order to avoid a collision with appellant's pickup truck, which Baker was able to identify as an International pickup truck when it was approximately twenty feet in front of him. The pavement was dry, but there was a little snow on the shoulder. The left front side of the pickup truck collided with the left front of the tractor-trailer. The force of the collision knocked Baker from under the steering wheel of the tractor-trailer and threw his assistant, Ladig, to the bottom of the cab, and both were rendered temporarily unconscious by the impact.

The evidence further discloses that when Baker and Ladig regained consciousness, their tractor-trailer had come to

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a stop on the highway in a jacked position, with the open part of the V facing to the north and the point of the V being located on the east bound shoulder of the highway. The tractor-trailer's bumper and front end were pointing to the north and were resting on the black line of the pavement separating the traffic lanes. The trailer portion extended from the shoulder of the east bound lane of the traffic in a northwesterly direction to a point about two feet from the north line of the concrete slab of the highway.

Appellant's vehicle was discovered by Ladig when he was placing flares on the highway a few minutes after he had regained consciousness at a point some fifty feet or more west of the tractor-trailer, and it was headed in a southwesterly direction in the east bound traffic lane. Appellant had remained in his vehicle. While there is some conflict in the testimony on this point, the greater weight of the evidence is to the effect that appellant was intoxicated at the time of the collision. Sheriff Ethar, who was called to the scene of the accident and who arrived some twenty or thirty minutes thereafter, immediately took appellant to the office of Dr. Schelley in Helena, who examined him. Upon the trial, Dr. Schelley testified that in his opinion appellant was intoxicated at the time of his examination.

After the flares had been set out as above related, Baker and Ladig discovered the Ford car of plaintiff's intestate a short distance east of appellant's pickup truck and off the highway on the north side thereof. It had come to rest at

1. The first part of the report is a general
description of the project and its objectives.
2. The second part is a detailed description of the
methodology used in the study.
3. The third part is a description of the results
of the study.
4. The fourth part is a discussion of the results
and their implications.
5. The fifth part is a conclusion and a list of
references.

right angles with the highway. Lying on the ground along side his car was the body of Joe R. Greer, plaintiff's intestate. Neither Baker nor Ladig had noticed the automobile of the decedent prior to this time, nor did they remember a vehicle striking their tractor-trailer. It will be remembered that they were rendered unconscious by the collision between their tractor-trailer and the pickup truck of appellant. As disclosed by the photographs in the record, decedent's automobile was practically demolished with part of the left front fender and some of the grill work of the radiator entirely gone. These parts of decedent's car were later found to be wrapped around the front bumper of the tractor-trailer. These items were positively identified as being parts of Greer's machine, as the grill work matched that remaining on his car and the portion of the fender recovered from the tractor-trailer fitted onto Greer's machine where the fender was missing and was of exactly the same color.

Appellant contends that the record is devoid of any proof showing any collision between the car of plaintiff's intestate and appellant's pickup truck; that as a matter of law, there is no evidence in the record to justify a wilful and wanton verdict; that there is no evidence in the record sufficient to sustain the burden of proof cast upon plaintiff's intestate and United to show their freedom from contributory wilful and wanton misconduct; that the conduct of appellant was not the proximate cause of the death of plaintiff's intestate, but appellant's action, at the most, only created a condition which enabled an intervening act by a third person to produce

at the 33rd Annual Meeting

of the American Society

for the Advancement of Science

held at the University of Chicago

from December 29 to January 2

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the injury for which redress is sought by plaintiff; that the verdicts are contrary to the manifest weight of the evidence and, finally, that the trial court erred in the instructions given to the jury.

Appellant contends that there is no evidence, circumstantial, or otherwise, to show a collision between the car of decedent and the tractor-trailer of United. It is to be observed that various witnesses discovered part of the fender and the radiator grill work of the car driven by decedent wrapped around the bumper of the tractor-trailer of United. This evidence was submitted to the jury along with all of the rest of the evidence, and the jury evidently came to the conclusion that the car of decedent ran into the tractor-trailer of United after appellant's pickup truck had collided with the tractor-trailer. The evidence found in the record sufficiently supports the conclusion of the jury.

It is next insisted that, as a matter of law, there is no evidence in the record to sustain the wilful and wanton charges. Counsel for appellant argues that the verdicts, being general, the presumption is that they are based upon the wilful and wanton counts. Such is the law. *Green vs. Noonan*, 372 Ill. 206; *Reell vs. Central Ill. Electric & Gas Co.*, 317 Ill. App. 106; *Green vs. Yeager* 336 Ill. App. 312. In this particular case, however, the special interrogatory submitted to the jury, and by the jury answered in the affirmative, shows that the verdicts are based on wilful and wanton misconduct. The greater weight of the evidence shows that at the time of the collision between the vehicle of appellant and that of United, the appellant was intoxicated; that he drove his car at night

time in the wrong lane of traffic and in the face of oncoming vehicles. Certainly we cannot say that such action on the part of appellant does not, as a matter of law, constitute wilful and wanton misconduct. It was clearly an issue to be presented to the jury. Turning from the right hand side of the pavement into the left hand side of the pavement into the path of oncoming traffic has been held to be a sufficient basis for a jury to find wilful and wanton misconduct. City of Lake Forest vs. Janowitz, 295 Ill. App. 289; Grais vs. Stagner 159 Tenn. 511 1918 S. W. (2d) 234. The driving of an automobile on a public highway by one who is intoxicated has been held in other jurisdictions to constitute such negligence as evinces an utter disregard of consequences. Tomask vs. Lendleren, 206 Wis. 94, 238 N. W. 857) ~~See also the case of the City of Chicago vs. the City of Chicago, 175 S.W. (2d) 331~~ If either driving on the wrong side of the highway against traffic approaching from the opposite direction, or driving on a public highway while intoxicated, is a sufficient basis to make an issue for the jury to decide on a question of wilful and wanton misconduct, then surely the combination of the two affords an ample basis to support a finding by the jury that appellant was guilty of wilful and wanton misconduct.

As to appellant's argument that there is no evidence in the record to sustain the burden of proof cast upon plaintiff and United to show freedom from contributory wilful and wanton misconduct, we must again observe that an issue was made on this question and submitted to the jury. Contributory

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willful and wanton misconduct bars a recovery. Willgeroth vs. Madison, 231 Ill. App. 430; Gavarnil vs. Miller, 293 Ill. App. 478. Since there were no eye witnesses to the collision between decedent's car and the tractor-trailer of United, it was necessary for plaintiff to make proof of the careful habits of decedent as a driver. The testimony of witnesses familiar with decedent's driving habits was introduced by plaintiff. There is ample evidence in the record from which the jury could have found that he was a careful and prudent driver. As to United, the evidence is undisputed that the witness Baker was driving its tractor-trailer along the highway at a moderate rate of speed and in his own traffic lane when appellant cut over into the lane where the tractor-trailer of United was being operated and by his action in so doing Baker was forced to drive his machine off the highway.

Complaint is also made that neither plaintiff in his complaint nor United in its amended counterclaim alleged freedom from contributory willful and wanton misconduct, and that they have thus failed to make out a cause of action. Then, however, did allege freedom from contributory negligence. This ^{was} ~~constituted a sufficient averment of freedom from willful and wanton misconduct.~~ ^{after verdict.}

Appellant also asserts that the most that can be said of his action is, so far as the death of plaintiff's intestate is concerned, that it furnished a condition whereby the act of an intervening third party could operate to bring about the injuries from which decedent met his death. The law

is that if the negligence or wilful and wanton misconduct does nothing more than furnish a condition by which an injury is made possible and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. *R.R. Co. v. Oswego*, 308 Ill. 275; *Griske vs. The Village of Burnham*, 379 Ill. 193. Appellant overlooks the fact that no third person's actions intervened in this case. This collision, so the jury determined, was caused by the action of appellant and not by the action of an intervening third party.

It is finally contended that the verdict is against the manifest weight of the evidence and that the trial court erred in giving certain instructions to the jury. We have read the instructions complained of and the authorities submitted in connection therewith. We agree with counsel that one or two of them are technically inaccurate, but we do not believe that such technical inaccuracies as may be contained in the instructions affords a sufficient basis for a reversal of this judgment, especially in view of the fact that the overwhelming weight of the evidence supports the verdicts returned and the judgments rendered thereon.

The cross-appeals of plaintiff's intestate and United must be sustained. The trial court erred in failing to include in the judgments interest from the date of the verdicts to the date of rendering judgment. "Judgments recovered before any court or magistrate shall draw interest at the rate of

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ANSWER

6. The sixth is the fact that the system is not in equilibrium.

7. The seventh is the fact that the system is not in equilibrium.

8. The eighth is the fact that the system is not in equilibrium.

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five (5) per centum per annum from the same until satisfied. When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered to the time of rendering judgment upon the case, and made a part of the judgment. (Ill. Rev. St. Chsp. 74, Sec. 3; *Reitz vs. Yellow Cab Co.*, 248 Ill. App. 287; *Little vs. Illinois Farmers Life Ass'n.*, 347 Ill. App. 547; *Berry vs. Kingmaker*, 113 Ill. App. 136.)

This cause is remanded to the Circuit Court of Joe Daviess County with directions to vacate the judgments previously rendered and to render appropriate judgments as indicated herein, costs to be taxed to appellant.

Reversed. All remanded with directions.

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In The
APPELLATE COURT of ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1949

HARLEY T. THACKER and
SWIFT & COMPANY,
a Corporation,
(Plaintiffs) Appellees,

vs

BEN L. HAMMER,
(Defendant) Appellant.

Appeal from the
circuit court of
Whiteside County.

Hon. Ray I. Klingbiel,
Judge Presiding.

339 I.A. 379

Bristow, J.

On May 3, 1942, shortly after dark at 8:30 P.M., Leroy Spray was driving a truck owned by Harley T. Thacker transporting produce, the property of Swift and Company, and was proceeding in an easterly direction on U. S. Route 30 about half way between Morrison and Sterling in Whiteside County, Illinois. Appellant, Ben L. Hammer, in company with his wife, two daughters and niece, was operating an automobile on the same route and traveling in the same direction. Alternate Route 30 joins this much traveled route on the north at the point in question, forming an inverted "T". To the south and adjacent to the two lanes of traffic comprising Route 20 is a third slab of pavement, sometimes called an apron, which is about 300 feet in length and lies equidistant on each side of the above intersection.

Hammer's car was stopped at this intersection, and it was his intention to turn into Alternate 30. At the moment he undertook to do so, the driver of the truck reached the intersection, and, to avoid a collision, the truck abruptly turned to the left, driving into a ditch on the north side of the highway and overturning. This accident caused a stipulated loss to Swift & Company of \$243.84, and to Harley T. Thacker the sum of \$1649.95, the resultant damage to the tractor and semi-trailer.

In The
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
CORROSBY TRUCK, S. D. 1943

HARLEY T. THACKER and
SWIFT & COMPANY,
a corporation,
(Plaintiffs) Respondents,
vs
BEN L. HANCOCK,
(Defendant) Appellant.

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

Appeal, J.

On May 1, 1943, the following facts were presented:

Garage was built on the north side of the highway.

The highway, the property of the State of Illinois, was

in an area of 100 feet wide on the north side of the

highway, the property of the State of Illinois, was

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State of Illinois, the property of the State of Illinois.

Suit was instituted by appellees against appellant to recover damages as the result of the alleged negligence of appellant in the operation of his automobile. The cause was tried by the Court without a jury, and judgment was entered for appellees and against the appellant in the amount heretofore indicated. This appeal is prosecuted and questions the propriety of this determination.

To justify a reversal of this judgment, appellant in his brief relies principally upon the contention that the driver of Thacker's truck was guilty of contributory negligence as a matter of law, and therefore appellees' recovery should be barred. Without dispute, Leroy Spray undertook to pass appellant Hammer's automobile at the intersection in question, and in doing so, it is contended, that he violated Section 155, Chapt. 95½ of Illinois Revised Statutes, which reads in part as follows: "No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions. . . (2). . .when approaching within 100 feet of or traversing any intersection."

Appellees' answer to this question is two-fold, namely: the above statutory regulation does not apply to the instant situation because of the existence of the third lane of pavement which was created for the purpose of allowing traffic intending to enter Alternate 30 to stop and wait upon it until they could safely cross the highway; secondly, even though it be admitted that Spray operated his truck in violation of the above section, such would not necessarily bar recovery, for it was a question of fact for the trial court to determine as to whether or not such conduct constituted contributory negligence.

Suit was instituted by appellees against appellant to recover damages as the result of the alleged negligence of appellant in the operation of his automobile. The case was tried by the Court without a jury, and judgment was entered for appellees and against the appellant in the amount heretofore indicated. This appeal is prosecuted and questions the propriety of this determination.

To justify a reversal of this judgment, appellant in his brief relies principally upon the contention that the driver of Theaker's truck was guilty of contributory negligence as a matter of law, and therefore appellees' recovery should be denied. With out dispute, Leroy Gray undertook to pass in front of Haver's automobile at the intersection in question, and in doing so, it is contended, that he violated Section 155, Chapter 155 of Illinois Revised Statutes, which reads in part as follows: "No vehicle shall, in overtaking and passing another vehicle on a two-lane highway, be driven to the left side of the roadway under the following conditions: (3) . . . when approaching within 100 feet of an oncoming vehicle at an intersection."

Appellees' answer to this question is two-fold; namely: (1) Above statutory provision does not apply to the facts of this case because of the existence of the third lane of highway which was created for the purpose of allowing traffic traveling in either direction to stop and wait on it until they can safely cross the highway; secondly, even though it is admitted that Gray operated his truck in violation of the above section, such violation is not necessarily bar recovery, for it was a question of fact for the trial court to determine as to whether or not such conduct constituted contributory negligence.

Leroy Spray, testifying for the plaintiff, said that, on the night in question, he was enroute to Chicago, Illinois from Sioux City, Iowa; that, as he approached the intersection in question, he saw Mr. Hammer's car standing in the third lane or south slab of pavement, apparently waiting for a car coming from the east to pass the intersection; that he, Spray, was proceeding eastward in the second lane from the north, and was driving approximately 35 miles per hour; that, when Hammer's car started its left turn, "I was right in back of him in the center lane and when he made the turn I didn't have time to stop or swing to avoid the accident. He was in front of me and in order to avoid the crash, I turned with him--I tried to turn to the north on the old road and I didn't quite make it. My equipment hit the shoulder and it went over in the ditch." Mr. Spray further testified that after the accident he had a conversation with Mr. Hammer; and that, "Mr. Hammer said he didn't know I was behind him, he didn't see me when he made the turn and he didn't know I was there until he had already turned and was crossway in front of me"; that later he heard Mr. Hammer say to a patrolman of the State of Illinois that he had failed to signal for his turn. Spray also testified that he did not blow his horn, but flashed his lights, and that he was quite familiar with this intersection.

Elizabeth Hammer, wife of appellant, Mrs. Peters and Mrs. Ricks, his daughters, testified on behalf of the appellant. Ben L. Hammer, the appellant, did not testify. Essentially, the only difference between the version of the accident as related by appellant's witnesses and appellees' witness is that, according to appellant's witnesses, Hammer's car came to a stop in the central lane of traffic as he was about to turn north on Alternate Route 30; while appellees' witness stated that Hammer's car was standing on the outside, south lane. It appeared from their testimony that they had made this stop to permit two cars coming from the east to pass the intersection, and that they did not see the approach of appellee's truck.

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The trial court, in making his decision in this matter, submitted a written opinion wherein he made the following observation: "The defendant did not testify and no explanation was made as to his failure to do so." Counsel for appellant in his brief cites many cases wherein it has been held that there should be no intendment against a party because he does not testify for himself. It is assumed by counsel, because of the statement made by the judge, that he was drawing an improper inference from the fact that Hammer did not testify, and that such improper inference led him to the erroneous conclusion that appellant was guilty of negligence, and the driver of appellees' truck was free from contributory negligence. Wigmore, in his treatise on evidence, Section 289, seems to lend support to the theory that when a defendant has not taken the stand or has failed to produce evidence, the natural inference is that such evidence would be unfavorable to that party. We do not believe that the trial court in making his innocuous reference to the defendant's failure to testify can be criticized. It is difficult for this court to suppress its curiosity and to not make a similar enquiry as to why Mr. Hammer did not testify. It was important to a proper decision of the issues involved herein, to determine exactly where appellant's car stopped just before he turned into the intersection. Mr. Hammer was the driver of that automobile. It was night time, and he would more likely know better than any of the other occupants of the car just where he stopped it, and just what he did to find out if it was safe for him to cross this busy thoroughfare.

Appellant in his brief cites many cases which hold plaintiffs were guilty of contributory negligence and were denied the right to recover damages where they undertook to pass another vehicle at an intersection. Viecelli v. Cummings, 322 Ill.App. 5 59. Citations from other jurisdictions where statutes are similar to the one invoked in the present case indicate the same line of reasoning. Houlihan et al v. Truckheimer 23 A 2d 352, (a Pennsylvania case); Rodgers v. Blandon, 294 N.W. 71; Bankers and Shippers Ins. Co. v. Blandon, 294 N.W. 697; Brown v. Raffety, 234 Mo. App. 620, 136 S.W. 2d 717.

If the court should assume that the trial judge herein gave credence to the testimony of Leroy Spray when he said that Hammer stopped his car on the third or south lane of pavement, then the situation in this case would be entirely different from those indicated in the cases cited by appellant. And, accordingly, Section 155, Chapt. 95 $\frac{1}{2}$ of Illinois Revised Statutes would not apply. The obvious purpose of the extra slab of pavement is to permit drivers who contemplate turning into Alternate 30 to stop in a place of safety, where they can remain until traffic has cleared both ways. They can then proceed across the highway without danger. The judge was in a position to observe and hear the witnesses, and, consequently, could better evaluate their testimony. In his written opinion, he indicated ~~some doubt~~ ^{some doubt} that he entertained ¹ in the verity of Mrs. Hammer's evidence. We are not disposed to disturb his findings unless they are palpably and manifestly wrong. The statement made by the truck driver that the Hammer car stopped on the south lane is more plausible and consistent with the other facts appearing in evidence. It is admitted by everyone that the truck was coming at a speed of about 35 miles an hour, and that he did not slow down in the least. It is also admitted by everyone that traffic consisting of one or two cars, was coming from the east for which Hammer was waiting. If Hammer's car had been in the central lane, it is extremely improbable that Spray would have continued to drive his car at undiminished speed into the intersection in view of the fact that cars were coming from the east that were reaching the intersection at approximately the same time he was.

The appellant, having stopped his car on the third lane to permit cars coming from the east to pass, it was not unreasonable for the driver of the truck to assume that his car would remain there until he had also passed the intersection. This court is of the view that the truck driver was not guilty of negligence when he proceeded across the intersection at undiminished speed. The trial judge was correct in concluding that it was Hammer's misconduct and negligence that proximately caused the accident in question and resulting damages to appellees' property.

JUDGMENT AFFIRMED

44645

160 A

ELEANOR NORTON et al.,	}	APPEAL FROM CIRCUIT COURT,
Appellants,		
v.		
ALICE W. BERRY et al.,		
Appellees.		COOK COUNTY.

339 I.A. 6451

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Eleanor Norton and five other plaintiffs filed a complaint in chancery to set aside a quit-claim deed executed by William F. O'Malley on October 15, 1946, and other conveyances concurrently made, as a result of which he and the defendant Alice W. Berry became the owners in joint tenancy of certain real estate. A freehold was not involved, since the parties during the course of the trial entered into a stipulation whereby the property was sold, and the proceeds of the sale were to be paid to the master in chancery, abiding the outcome of the litigation. The cause was referred to a master in chancery, who found that William F. O'Malley on October 15, 1946 knew the nature and meaning of his act when he signed the deed in controversy, and that he possessed sufficient mental capacity on that date to execute the conveyance. The chancellor entered a decree in conformity with the master's recommendation, finding that upon O'Malley's death on November 2, 1946 the defendant Alice Berry became and was the sole owner of the real estate as the surviving joint tenant, and directed the master to pay her the proceeds of the sale of said property when they became available. Plaintiffs have taken an appeal.

William F. O'Malley and Alice W. Berry, who was employed by the Board of Education as a truant officer, had been devoted and inseparable companions for twenty years. O'Malley had been a patient in the Illinois Masonic Hospital from October 10, 1946 to the date of his death on November 2, 1946. While there, he executed the deed in question on October 15, 1946. He was suffering from monocytic leukemia and cancer of the lung, and died as the result thereof.

The complaint is predicated upon the theory that O'Malley did not have sufficient mental capacity to appreciate what he was doing, or to protect his own interests in the transaction, at the time he conveyed his property, and that he was so placed as to be subjected to the influence of defendant Alice W. Berry, the real grantee. Plaintiffs rely upon the testimony of two witnesses, Dr. Marjorie C. Meehan, a physician specializing in psychiatry and neurology, with a good educational and medical background, and Julia Eshoo, a student nurse at the Illinois Masonic Hospital, who attended O'Malley during his last illness. Dr. Meehan stated that at the request of Dr. Schwartz, O'Malley's attending physician, she examined the patient on October 25, 1946, which was the only time she saw him. That examination was made ten days after the deed in question was executed. She testified that the physical findings of the neurological examination made by her were indicative of organic brain disease, "in the presence of which there is probability there would be serious impairment of mental function," and that in her opinion, O'Malley did

not on October 15, 1946 have sufficient mental capacity to make a deed or understand the particular business that he was about and its effect, or to exercise his will in regard thereto. She stated that in her opinion and in her experience the condition which she found could not have developed in a period of ten days, but admitted that O'Malley's ailment was a progressive condition which, on October 15, was probably less severe than at the time she examined him ten days later.

Miss Eshoo did not see O'Malley on October 15 because she was not on duty that day. She first saw him on October 14, and next on October 16. The master called attention to the fact that her testimony on direct-examination as to her observation of O'Malley on October 14 was in conflict with her statement on cross-examination as to O'Malley's condition on that day. On direct-examination she stated that O'Malley was irrational, that bed-sides were applied, and that he had to be in bed, whereas, on cross-examination, in reply to the question "Did you notice anything unusual about his mental condition or his irrationality on October 14th?", she replied: "I couldn't say"; "I will say 'No,' because I am not sure"; "I don't remember."

On behalf of defendant, Dr. Otto Schwartz, the physician who took care of O'Malley, testified that he had practised medicine since 1908 and was attending medical physician at the hospital at the time of O'Malley's illness. He was in daily attendance of the patient from

October 10 until the date of his death. O'Malley came to Dr. Schwartz' office on reference of Dr. Ferguson on October 10, and after a thorough examination, hospitalization was recommended, and O'Malley entered the hospital that day. Dr. Schwartz was of the opinion that he was mentally clear when he first saw him. He examined the patient once or twice a day at the hospital up to the time of his death. During an examination on October 11 the patient co-operated with him, and in Dr. Schwartz' opinion he appeared to be normal on that day. Also, in examinations made on October 13, 14, 15 and 16 the doctor and O'Malley conversed with each other, and Dr. Schwartz stated that he was of the opinion that on October 15 O'Malley had sufficient mental capacity to sign papers transferring his property and to know the nature and meaning of his act on that day. It further appears from Dr. Schwartz' testimony that on October 16 the patient had an X-ray examination of the upper G-I tract (meaning the stomach) and that during the X-ray and fluoroscopic examination he co-operated with the X-ray specialist, and with Dr. Schwartz after he returned from the X-ray department. Dr. Schwartz testified that to his knowledge no narcotics were administered, nor were any indicated as part of the treatment.

John W. Hayward, another witness testifying on behalf of defendant, was engaged in the real estate business. He had known O'Malley for about twenty years, and for about the last six years they were close friends

and spent considerable time together. He saw O'Malley during the month of September 1946 at a restaurant with the defendant. O'Malley then told him that he was ill. The next time he saw O'Malley was at the Masonic Hospital on October 12, when he seemed "mentally as he always was in the past"; he observed no change in him. Hayward visited O'Malley every two or three days until about a week before his death. From several conversations he had with the patient between October 12 and the last time he saw him, Hayward formed the opinion that O'Malley was sound mentally, and he noticed no change in his mental condition at any time during that period.

Another witness called on behalf of the defendant, Katherine Scaglione, had known O'Malley for about twelve years, during which time she saw him almost every evening. She visited him at the hospital for the first time on October 11, and again saw and conversed with him on the following Sunday, which was October 13, and then on Tuesday, October 15. She testified that on the latter date O'Malley told her that he had taken care of his affairs and of Alice; that he had made his will and put his house in joint tenancy and gave her everything he had, since he wanted her "to be taken care of." She likewise stated that she observed no change in his mental condition during her various visits at the hospital, and that "he seemed to me the same as he always was."

Elizabeth Seymour, another witness called on behalf of defendant, stated that she met O'Malley at

the hospital on October 11, when she was introduced to him by her husband who occupied a bed in the same room. During week days and twice on Saturday and Sunday, up to October 16, when her husband was discharged from the hospital, she saw and conversed with O'Malley while he was a hospital patient. Specifically, on the night of October 15 O'Malley asked her whether her husband had told her he witnessed a will, and when she told him that he had, O'Malley said, "Well, she has been so good to me for the last twenty years I want her to have it; I don't want her to have any trouble with the property going through the Probate Court or anything." In her opinion O'Malley was of a clear mind on October 15, and again on the following day, when she took her husband home from the hospital.

O'Malley's brother, James W. O'Malley, and also a brother of the plaintiffs, was called as a witness on behalf of defendant. He was a retired fire captain of the City of Chicago, and testified that he had seen William F. O'Malley at the hospital every afternoon, Sundays excepted, from October 16 until his death. He stated that he had known Miss Berry for about ten years, and had seen her in his mother's home when she was alive; that some time between October 16 and November 2 he was sitting with defendant at the bedside of his brother, and when defendant left the room, his brother said: "Did you see that woman that just left the chair? * * * She is a million with me. She has been my pal for 20 years and I want you to stand beside her until I get

better."

The contention that O'Malley's deed and the other conveyances were made through the influence of the defendant rests upon conjecture. It is not urged that defendant exercised any direct influence over O'Malley in procuring the property but that he was so placed as to be subjected to her influence. There is no evidence to support the charge. Defendant and O'Malley had been devoted to each other for many years, and there is sufficient evidence to show that he wanted her to have the property before his death and asked his attorney to attend to the transfer. The master who heard the evidence was evidently not impressed with the charge of undue influence, and from an examination of the record it appears to us he would not have been justified in making any finding on the subject adverse to defendant.

With respect to O'Malley's mental condition and his ability to protect his own interest in making the conveyances in question, the master found that the evidence of Dr. Schwartz, his attending physician, who had seen him daily during the period of hospitalization, was entitled to greater weight than that of Dr. Meehan who saw the patient only once, some ten days after the deed was executed, and that the testimony of other witnesses substantiated Dr. Schwartz' opinion as to his mental condition and his capacity to look after his own interests in the transaction.

We think the master's conclusions are sustained by the evidence. Plaintiffs failed to prove the charges

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alleged in their complaint, and therefore the decree of the Circuit Court should be affirmed; it is so ordered.

Decree affirmed.

Sullivan and Scanlan, JJ., concur.

44726

CLYDE LANNON,)
Appellee,)
v.) APPEAL FROM MUNICIPAL
GEORGE ALEX and PETER ALEX,)
Appellants.) COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

339 I.A. 345²

An action in tort for damages to plaintiff's automobile, alleged to have been sustained by collision with a truck owned by defendants, resulted in a verdict and judgment for plaintiff in the amount of \$143.09, from which defendants appeal.

The collision occurred January 15, 1943. Plaintiff's suit was filed September 25, 1947 and was tried September 21, 1948, more than five years after the accident. It appears from the evidence that plaintiff, who was proceeding east very slowly on 76th street, first saw defendants' northbound truck on Emerald avenue when it was about 50 yards south of 76th street. There were no buildings on the corner to obstruct his view. It was a wintry day, with the streets icy and slippery. Defendants' driver testified that his truck was going only ten miles an hour as he approached the intersection, that he slowed it down to a speed of about three miles an hour after applying the brakes, but because of the slippery condition of the street he could not stop the truck but "glided" onto 76th street, where the truck and plaintiff's car collided. It is defendants' contention that plaintiff made no effort whatsoever to change the course of his

automobile crossing Emerald avenue, but relied entirely on the fact that he had the right-of-way, and their counsel say that if plaintiff had changed his course by so much as one foot the collision would not have occurred, and that it was his duty to so change his course.

Following the accident but before putting the car in a repair shop, plaintiff brought it over to defendants' place of business where one of the defendants inspected it, and that defendant testified that aside from a broken headlight and a little scratch on the fender, there was no damage. Defendants' truck sustained no damage whatsoever as the result of the collision. Plaintiff filed no brief on appeal, nor did his counsel appear when the case was set for oral argument; consequently we have no way of ascertaining what his contention is with respect either to liability or damage.

Assuming, but not deciding, that defendants were liable, the amount of the verdict is grossly excessive. Plaintiff's own estimate of the damages appears to have been about \$25.00. Defendants' truck was not damaged at all, and it seems highly improbable that plaintiff's 1936 Plymouth could have sustained serious damage when the two cars were proceeding at an extremely slow rate of speed immediately prior to the collision.

Accordingly, if plaintiff will, within ten days, file his consent to a remittitur of \$118.09, judgment in the amount of \$25.00 will be affirmed; otherwise the judgment will be reversed and the cause will be remanded for

-3-

a new trial.

Judgment affirmed upon filing consent to remittitur; otherwise, judgment reversed and cause remanded for a new trial.

Sullivan and Scanlan, JJ., concur.

44466

JOSEPH MARADEO,
Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a Municipal Corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

339 I.A. 546

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE
COURT.

An action to recover for personal injuries and property damage alleged to have been received by plaintiff in a collision involving defendant's streetcar and plaintiff's automobile. The jury returned a verdict for \$2,500. Defendant's motion for a new trial was denied and judgment was entered upon the verdict. Defendant appeals.

Defendant states: "Defendant does not deny liability but claims that the verdict of \$2,500 was excessive because there was no causal connection established between the accident and the condition requiring the nose operation"; that plaintiff's other injuries could not possibly support a verdict of \$2,500, and that the testimony for plaintiff as to his condition before and after the accident was insufficient to establish a causal connection between the accident and the nose operation. Defendant states that it "makes no claim that the verdict is against the manifest weight of the evidence"; that its position is that plaintiff failed to establish, by competent evidence, a prima facie case showing a causal connection between the operation by Dr. Brown and the accident, and that plaintiff could not make out a prima

facie case in that regard without the testimony of Dr. Brown. Defendant admits that "on April 7, 1946, at Chicago Eye, Ear and Nose Hospital, Dr. Brown operated on plaintiff's nose.

* * * His nose was taped, packed, and splinted and he remained in the hospital for four days after the operation. He paid Dr. Brown \$250, and the hospital \$41.00." But

defendant contends that plaintiff failed to prove a causal connection between the accident and the condition for which Dr. Brown performed the operation. Defendant admits that plaintiff had a bloody nose as the result of the accident but insists that "there is a big gap between a bloody nose and * * * a nose operation," performed by Dr. Brown. Plaintiff offered evidence to show that he sustained the following special damages in connection with the accident: Fee of Dr. Brown, \$250; charges of Chicago Eye, Ear, Nose and Throat Hospital, \$41; charges of the South Chicago Hospital, \$12.50; repairs to plaintiff's automobile, \$97.81; for loss of time sustained by plaintiff, \$172.50; fee of Dr. Starceovich, \$117. Defendant contends that the fee of Dr. Brown and the charges of the Chicago Eye, Ear, Nose and Throat Hospital are not proper charges.

The accident to plaintiff occurred about midnight on March 24-25, 1946. Plaintiff testified that after the impact he was wedged in between the door and the steering wheel of his car and that the streetcar moved on about 100 feet after the impact; that when his automobile was struck he was thrown backward and then forward; that he had brought his car to a stop in front of 6028 Blackstone avenue, the

home of Miss Eberhart; that there were no dents or marks of any kind on the car prior to the accident; that he was bidding Miss Eberhart goodnight when "there was a big crash. My car went up over the sidewalk about 15 to 20 feet. A street car struck my car. After the accident, the rear of the street car was about 100 feet away from my car"; that when his automobile came to a stop after the crash he was wedged in between the steering wheel and the door; that Miss Eberhart was down on the floor; that he had a little blood coming out of his nose and felt pain in his entire left side and around to his back and in his head; that the pain on the left side was the most severe; that when the motorman reached plaintiff's car he stated that he was sorry that he did not see plaintiff as he was punching transfers; that the police came there and took plaintiff to the Woodlawn Hospital, where he was treated "for my side and I was taped"; that his nose continued to bleed for about five minutes after the accident; that on leaving the hospital he went to Miss Eberhart's house and stayed there the night of the accident; that the following morning when he observed his face he saw that his nose was "swollen up," that he had bruises over on the side (of his nose); that his eyes were a little yellow; that he had two black eyes; that on the morning of March 25 he went to Dr. Starceovich's office, located at 92d and Commercial avenue; that the doctor was out and plaintiff had to return to the office about 2:30 p.m.; that the doctor examined plaintiff's side, eyes, ear, nose and mouth, and took off

the tape that was on plaintiff's side and felt around; that he felt plaintiff's nose a little and told plaintiff to go over to South Chicago Hospital and get an X-ray; that the X-rays taken of plaintiff's side showed no fractures; that he experienced sharp pain in his left side when he breathed; that his ability at this time to stretch his arms was not good, that he would feel pain when he did so; that he also had pain in his nose and through his eyes and side and a little pain in the back; that Dr. Starceovich taped him from his chest around to his back and down to his hips; that the tape remained on his side for about three weeks; that on April 5, 1946, he saw Dr. Brown, an eye, ear and nose specialist, located at 540 North Michigan avenue; that he went to Dr. Brown to have his nose examined because Dr. Starceovich told plaintiff that he did not treat noses and that plaintiff must see a nose doctor; that between March 25 and April 5 he was using ice bags on his nose; that five days after the accident the nose swelling started to go down; that Dr. Brown examined plaintiff's nose, with an instrument, through the nostrils; that on or about April 7, 1946, plaintiff went to the Chicago Eye, Ear and Nose Hospital and Dr. Brown operated on his nose; that he remained in the hospital four days and had a bandage on his nose; that he was taped with a piece of tape with two splints which were on the outer surface; that they put packings inside his nose; that during his stay at the hospital he had pains in his head and side; that it was paining him more because he had to breathe through his

mouth; that after returning home from the hospital he saw Dr. Starceovich for his side and that he continued to go to that doctor for treatment; that Dr. Starceovich would lay him upon a table for ten or fifteen minutes and treat him with a lamp; that this treatment continued for about five months; that for the first two months he visited the doctor about twice a week, after that about once a week, and after the fifth month he visited the doctor once every two weeks; that he was absent from his work about three weeks and that upon his return to work he tried to operate the elevator but could not do it, so that his boss gave him time on the floor so that he could take it easy; that for about three weeks he just kept the cars operating; that his salary was \$230 a month; that his ailments all cleared up in due course; that "the physical condition of my nose now with regard to my ability to breathe is good." On cross-examination plaintiff testified that he played football from the time he was about eighteen years of age until he was about twenty-five years of age; that he played on a number of prairie teams and sometimes collided with players going at full speed and "got some bruises. I got pushed around"; that he had his nose attended to several times while he was playing football; that he was probably hit in the nose at least seventy times while playing football; that the last time he played football was about 1939; that when he was sixteen years old he started as a boxer with the C. Y. O. and boxed in church tournaments; that he was never good enough to box in the Stadium; that he did

not make good in boxing and quit it; that the only doctor he ever had before the accident was when he had pneumonia; that he had trouble breathing at that time; that when he went to the Woodlawn Hospital the night of the accident he saw a doctor or an interne; that he had a pain in his side when he breathed and "my nose was swollen a little"; that there was some blood on his shirt after the accident; that nobody at the hospital did anything for the nose and made no examination of it; that he made no complaint at the hospital that there was anything wrong with his nose; that the day after the accident when he got to the Chicago Surface Lines' office he walked up the stairs to the second or third floor, as there was no elevator there; that he talked to a woman there and that at the time he had some bruises or marks on his face; that he had a bandage on his nose after he left the South Chicago Hospital; that he was in one accident before the one in question in which he got a crack in the back of his head and two stitches were taken in the back of his head in an emergency hospital; that he did not tell Dr. Brown that the reason that he wanted his nose operated on was for looks. The witness was cross-examined about a Dr. Dobbs and testified that he did not know any such doctor and never made any statement to him.

Dr. Paul J. Starcevich, a witness for plaintiff, testified that he was a physician and surgeon and was licensed to practice in 1930; that he was on the staff of the South Chicago Hospital and was in general surgery;

that on March 25, 1946, plaintiff came to see him professionally at his office; that he stated that he had been in an automobile accident that night or the previous night; that the doctor took a history in order to find out the details as to what occurred; that plaintiff had a slight discoloration underneath both eyes and complained of pain in the left side of the chest; that he looked into plaintiff's nostrils and saw a deviated septum; that there was some swelling and a small amount of bleeding in the nose; that he examined plaintiff's side, as the latter complained of pain on respiration in the left side; that he told plaintiff that he would have to have an X-ray of his chest before he would make a diagnosis; that he wanted it confirmatory of any fractures; that plaintiff complained of his nose; that "I told him to apply ice bags. I was no eye, ear, nose and throat man, that he would have to seek further care on that. I examined his nose with a novoscope at that time, I looked in there. I found a deviated septum in there, which is a septum deflected and out of line. I had occasion at a subsequent date to examine the nose at the bridge. It was deflected. It means out of place. I could manipulate the nose from the outside. That would indicate to me as a medical man that he had trauma there"; that "I would suspect a fracture there"; that about April 11 or 12 he saw plaintiff again in his office; that at that time "he had splints on his nose; evidently he went to a nose doctor and had it taken care of"; that he continued to treat plaintiff, his side, not his nose; that

plaintiff came up to his office to see him quite frequently until about June of that year; that he was complaining quite a bit of pain on respiration and movement of his chest, and "I told him - it was strapped, and I explained to him that he had no fractures there, that he did have a contusion; that more likely what he had was a traumatic contusion with a neuritis of the left side of the chest." The following then occurred: "Q. Just explain what you mean when you said it was a traumatic condition? A. It was violence. * * * Q. I understood you to say you found a condition of trauma? A. I said it was due to trauma. * * * Well, from his history and findings, I gathered he was hurt; in other words, that is what we mean by trauma - violence." The following then occurred: "Mr. Coghlan [attorney for plaintiff]: Q. Doctor, from your various examinations, observation and treatment, can you state with a reasonable degree of medical and surgical certainty whether or not the pathology found and which you have described might or could be caused by trauma or direct force on March 25th, 1946; will you answer yes or no? A. Yes. Q. * * * what is that opinion? * * * A. It could be due to trauma. Mr. Coghlan: Q. This condition in due course cleared up, did it not, Doctor, the condition of the side? A. The side, yes. Q. The condition of the back and condition of the nose? A. Yes. Q. There is no permanent injury to this man? A. None whatsoever." Upon cross-examination the doctor testified: "I saw him up until June, 1946. I

first saw him in March. I gave him diathermy. At the time I saw him, I saw no evidence of any bruises on him whatsoever, outside of the discoloration which he had underneath his eyes. I saw no bruises on his chest whatsoever. I did not say that I saw no bruises around his eyes. I said discolorations. There is quite a big difference. There was no swelling whatsoever of his nose underneath the eyes. When I first saw him the day after the accident, I saw some swelling of his nose from examination internally. Some swelling internally, no swelling externally. His nose did not look normal externally. I said he had a deviated septum. As to whether that is inside the nose, it is outside the nose, too. His nose was not swollen externally, internally, yes. I did not see any bruises or contusions at all on the outside of his nose." Upon redirect examination the witness testified that he could not tell from the examination internally whether this condition was of recent or long standing duration; that that could be told at the time of surgery; that he could not tell about the origin of the deflected septum; that he found blood in the nostril; that X-rays are not necessary in diagnosing a fracture of the nose if you can feel them and see them; that he felt a deviated septum in this case, which indicates fractures - that there is a fracture there, but as to how recent it was or how long it was, he does not know. On recross-examination the witness testified that you can get a fractured nose from getting hit in the face or nose; that you can get it from football.

Betty Eberhart, a witness for plaintiff, testified that she was acquainted with plaintiff and had been keeping company with him for some time; that she was in his company on March 24, 1946, and that when they got to her home that evening about midnight plaintiff brought his car to a stop almost in front of her home; that when he brought his car to a stop he was on the west side of the street right in front of her home; that she was saying goodnight to plaintiff when there was a terrible crash; that the car was pushed and she fell up against the front of it; that she saw plaintiff in the car after the accident; that the conductor opened the car door and helped plaintiff out; that his nose was bleeding very badly at the time; that the police arrived at the place about ten minutes after the accident and drove them to the Woodlawn Hospital; that the next day plaintiff was complaining about his side and his nose was swollen; that before the accident his nose was straighter than it is now; that he did not have a distorted nose before the accident; that it was a straight nose; that before they went to the hospital his nose was swollen. Upon cross-examination she stated that the day following the accident plaintiff's nose was swollen quite a bit and his eyes were black and he had a little black right across the bridge of his nose; that his nose was swollen very much.

William J. Maloney, a witness for defendant, testified that on March 23, 1946, he was employed by the Surface Lines and was operating a one-man streetcar; that he ran

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into an automobile that was parked there; the right front fender of the streetcar, or the bumper, struck the left rear fender of the automobile; that the fender was damaged; that when he stopped his car the front end of it was about at the front of the automobile or may have been slightly ahead of the front of the automobile, but not very much; that he got out of the streetcar and asked if anybody was hurt in the car and they answered no; that when he was talking to plaintiff he did not see any evidence of personal injury to plaintiff at all; that there were no marks or bruises of any type, his face or anywhere else; that he got the man's name and address and license number of the car; that they did not ask for any medical treatment and there were no police there when the witness was there; that he does not recall seeing a girl there; that "I don't remember seeing any marks or injury." Upon cross-examination the witness testified that it was a one-man car and he performed the duties of a motorman and conductor; that he was twenty or twenty-five feet from the automobile when he first saw it and was going five or ten miles an hour; that he passed out witness cards to the passengers.

William Mulcahey, a witness for defendant, testified that on March 24, 1946, about midnight, he was on a streetcar that was involved in the accident in question; that he recalls the streetcar bumping into an automobile but that he does not remember it too well; that the driver of the automobile and the conductor started to argue and that he did not see any cuts or bruises or blood on the person who was

arguing with the conductor; that he could not identify the person that talked with the conductor and does not know whether he was a young or an old man, and "I could not tell whether he gave any visible mark of injury from where he stood"; that he remained on the streetcar after the accident.

Barbara H. Smith, a witness for defendant, testified that she had been employed by the Surface Lines for over twenty-nine years as a statement clerk; that she takes reports of people who are injured who come and tell her what happened; that on March 26, 1946, Joseph Maradeo and Betty Eberhart made her a statement as to the accident in question; that she typed their statements. The witness identified the statements and they were admitted in evidence as Defendant's Exhibit 1. The witness further testified that in looking over the statement it appears that Joseph Maradeo did not tell her anything about an injury to his nose. The exhibit shows that plaintiff did not sign the statement. Plaintiff testified that he refused to sign the statement because it did not contain everything that he told Miss Smith; that he told her, "put down about my nose," and she said, "it don't look like it is so bad." Miss Eberhart corroborated this testimony of plaintiff. Defendant, in its analysis of the evidence in reference to the injury to plaintiff's nose, does not refer to the testimony of Miss Smith. In any event, the jury passed upon the credibility of the witnesses.

Defendant argues that Dr. Starcevich testified

that surgery could determine whether the nose condition was new or old; that plaintiff did not call Dr. Brown, who performed the operation, to testify, and therefore "it must be presumed that such evidence would have been unfavorable to plaintiff." In support of this contention defendant cites Princell v. Pickwick Greyhound Lines, 262 Ill. App. 298, which was decided by this Division of the court. There the plaintiff, in order to prove that the defendant, Pickwick Greyhound Lines, owned or controlled the bus in question, was compelled to offer circumstantial evidence. In passing upon the effect and weight of that evidence we stated (p. 313): "Appellant offered no evidence upon the question of the control or ownership of the bus. Such evidence, of course, was in its possession and control. The same counsel represented all of the defendants and it was within his power to prove definitely the company or companies that owned and controlled the bus. He saw fit to offer no evidence upon the subject. It has been frequently held that where one party has evidence upon a point as to which the other party has made a prima facie case, but fails to present it, such failure may be taken as an admission that such evidence, if presented, would not aid the party who has it." Our ruling in that case has no application to the instant one under the facts. In Village of Princeville v. Hitchcock, 101 Ill. App. 588, the court discussed the rule that an unfavorable presumption arises against one who withholds evidence within his power. The court then stated (p. 591): "The rule does not apply where

the omission is to call a witness who might equally well have been called by the other party. (Scovill v. Baldwin, 27 Conn. 316.)" Many other cases to the same effect might be cited. In the instant case it appears that Dr. Brown has his office on North Michigan avenue, in Chicago, and it is idle for defendant to argue that its opportunity to produce Dr. Brown was not equal to that of plaintiff, especially as defendant made no showing upon that point.

X Defendant contends that in the instant case "expert testimony was required to establish the connection" between the operation performed by Dr. Brown and the accident. In Chicago Union Traction Co. v. May, 221 Ill. 530, the court stated (p. 536):

"The evidence showed beyond all question that prior to her injury Mrs. May was a strong, healthy woman; that she frequently walked from the business district of the city to her home, - a distance of from four to five miles; that she did the household work for a family of three, - her husband, her father and herself, - including the washing and ironing, and earned on an average \$300 a year at her trade as dress and waistraker; that immediately after the injury she had serious pains in her head, back, left leg and in the region of the abdomen; that her genital organs soon became diseased, and within a few weeks she became, and has continued to be, unable to take any physical exercise, or to walk, without great pain in her head, back, left leg and lower part of the abdomen. The physicians who treated and operated upon her did not say

that the conditions they found when they operated were not the result of an external injury, but, at most, said they could not say they were the result of such injury. One said he could imagine they were. We think it was a correct practice for the court to permit appellee to prove the condition of her health at and prior to the time she was injured, and then to follow up that proof by showing her physical condition from the time of her injury down to the time of the trial, and to submit the question of the cause of her then physical condition, as a question of fact, to the jury under proper instructions, which was the course of procedure followed in this case."

The rule announced in the May case has been frequently cited with approval but it has never been reversed nor modified.

In Engelman v. Chicago Transit Authority, 338 Ill. App. 129, the court stated (pp. 135, 136):

"It is argued that no causal connection is shown between the accident of June 14 and the fracture of the vertebra. The jury were entitled to believe that before the accident the plaintiff was in good health and that after the accident he suffered pain in the region where this fracture was located. There was testimony that the fracture could be caused by a violent backward motion and the plaintiff testified that at the time of the accident he 'was pushed forward and snapped back, and I fell sideways against the door posts.' The fact that the doctor was not specifically asked the question as to whether or

not in his opinion there was a causal connection between the accident and the condition of ill-being of which plaintiff complained is not controlling. In the case of Chicago Union Traction Co. v. May, 221 Ill. 530, where no doctor testified that the conditions found were or could have been caused by accident, the court said at page 536: [Here the court quotes with approval the "correct practice" laid down in the May case.] A similar holding is contained in Heil v. Kastengren, 328 Ill. App. 301."

In our judgment it was not essential for plaintiff to call Dr. Brown in order to prove a causal connection between the nose operation and the accident, as plaintiff's proof, in our judgment, was clearly sufficient to warrant the jury in finding that there was a causal connection between the accident and the operation. Defendant argues that plaintiff had played sixty or seventy games of football and had frequently been hit in the nose playing that game, and that he had boxed in C. Y. O. tournaments and had been hit in the nose a number of times, and defendant suggests, rather than contends, that the injury to plaintiff's nose, upon which Dr. Brown operated, might have been caused by football or boxing. It would amount to no more than a mere conjecture to assume that plaintiff's fractured nose resulted from football or boxing.

The jury were undoubtedly favorably impressed, as we are, by the frank nature of plaintiff's testimony. He admitted that he had been hit in the nose, playing football and boxing, many times. Upon direct examination the

following occurred: "Q. Did this condition of your side gradually grow better? A. Yes, sir. Q. Do you have any pain in your side at the present time? A. No, sir. Q. Do you have any pain in your back at the present time? A. No, sir. Q. Do you have any pain in your nose at the present time? A. No, I have not. Q. Do you have any pain in your head at the present time? A. No, sir. Q. So, these things all in due course cleared up, is that right? A. Yes, sir. Q. What is the physical condition of your nose now with regard to your ability to breathe? A. Good." The jury undoubtedly concluded that plaintiff was not attempting to exaggerate his injuries and that he was not a malingerer.

After a careful consideration of the instant appeal we are satisfied that the damages awarded plaintiff are not excessive.

The judgment of the Circuit court of Cook county should be, and it is, affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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163 A

H. J. COLEMAN & CO., INC.,)	
a corporation,)	
)	Appellee,
)	
v.)	APPEAL FROM MUNICIPAL
)	
JAMES CAMPBELL,)	COURT OF CHICAGO.
)	
	)	Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for brokers' commission in procuring a buyer to purchase defendant's property located at 233 Swan street, Chicago, Illinois. A jury was waived and there was a trial before the court. The court found the issues in favor of plaintiff, assessed its damages at \$362.50, and entered judgment against defendant for that amount. Defendant appeals.

Defendant gave plaintiff an exclusive thirty days sale contract to sell the premises in question for \$7,250, payments to be made as follows: Cash \$3,500 and the balance at \$50 or \$60 per month with six per cent interest or until three-quarters of the amount had been paid, then a deed to be issued. The sale was not consummated.

Defendant contends that "a broker has not earned his commission until he has produced a buyer, ready, willing and able to buy according to the terms of the brokerage contract," and that plaintiff failed to produce such a buyer. The trial court found that plaintiff produced a buyer ready, willing and able to buy according to the terms of the contract, and the evidence, in our judgment, sustains that finding.



Defendant next contends that "where a broker's contract of sale contemplates the completion of the sale before commission is earned, no commission is payable until a sale is consummated." We may assume for the purposes of this appeal that the contract contemplated the completion of the sale before the commission was earned although plaintiff contends, and with considerable force, that the contract did not contemplate the payment of a commission only in the event of a consummated sale. Milford M. Abelson, associated with plaintiff corporation, testified that on October 31, 1947, at defendant's home, he told defendant that he had these people all set to buy the building and they wanted to make an appointment with defendant when they could come in and make a deal on the furniture. "He told me he had changed his mind, he didn't want to sell the building, he told me he was giving it away and he would not sell it for less than \$8,500.00. I told him that was prohibitive and told him it was not worth that and further he had given us an exclusive at \$7,250.00 and I had a buyer ready, willing and able, and I said we had earned the commission. He said 'I saw your ads in the Defender, I will pay you for your ads. That is all I will give you.'" Defendant, at the trial, did not deny this testimony of Abelson, and upon the oral argument counsel for defendant stated that they would concede that the testimony of Abelson was true.

In Goldstein v. Rosenberg, 331 Ill. App. 374, 375,



the court states:

"Defendant's position is that the consummation of the deal was a condition precedent to his obligation to pay a commission, even though the failure to consummate the deal was due to his fault. This position is untenable. Defendant cites a number of cases, in most of which the purchaser defaulted in the performance of his contract. The better rule, consistent with honesty and fair dealing, is that the seller cannot take advantage of a condition precedent the performance of which he has rendered impossible. Stern v. Gepe Realty Corp., 289 N. Y. 274; 12 Am. Jur., Contracts, Sec. 329; Restatement of the Law, Contracts, Sec. 295; Williston on Contracts, Rev. Ed., vol. 3, sec. 677."

Under the facts and the law there is no merit in defendant's instant contention.

After a careful consideration of the entire evidence we are satisfied that there is no merit in this appeal.

The judgment of the Municipal Court of Chicago should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

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164 A

HENRY P. EDWARDS,)	
Appellee,)	APPEAL FROM CIRCUIT COURT,
v.)	COOK COUNTY.
EDNA VIRGINIA LEDERER,)	
etc.,)	
Appellant.)	

333-53-6471

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, Henry P. Edwards, to recover damages for personal injuries, which he claims were caused by the negligence of Mattie Gerd1, while he was on her premises as an invitee. Defendant's answer alleged inter alia that the status of plaintiff at the time and place of his injury was that of a mere licensee. The suit was instituted against Edna Virginia Lederer, individually and as executor of the estate of Mattie Gerd1, deceased. During the trial the cause was dismissed by plaintiff as to Edna Virginia Lederer individually. The case was tried by the court and a jury and a verdict was returned finding the defendant guilty and assessing plaintiff's damages at \$5,000. Judgment was entered against defendant on the verdict. No motion for a new trial was made by defendant and her motion for judgment notwithstanding the verdict was overruled. Defendant appeals from the judgment.

Defendant contends that the trial court erred in denying her motion for judgment notwithstanding the verdict. In our determination of this contention the only question we deem it necessary to consider is whether plaintiff was

an invitee or a mere licensee at the time and place of his injury.

The rule governing the consideration and disposition of a motion for judgment notwithstanding the verdict is clearly stated in Hunt v. Vermilion County Children's Home, 381 Ill. 29, where the court said (p. 32):

"A motion for judgment notwithstanding the verdict under the above section of the Civil Practice Act [subsection 3 (a), sec. 68, par. 192, chap. 110, Ill. Rev. Stat. 1947] has the same effect as a motion for a directed verdict and raises the same questions. Such a motion raises as a question of law whether from the evidence in favor of the plaintiff, if considered as true, together with the inferences that may be legitimately drawn therefrom, the jury might reasonably have found for plaintiff. Neither the trial court nor this court on appeal is permitted to weigh the evidence to determine where the preponderance lies. It is not a question of whether the verdict is against the weight of the evidence. The sole question is, whether the evidence, when considered to be true, together with all legitimate inferences to be drawn therefrom, tends to prove the plaintiff's case. Walaite v. Chicago, Rock Island and Pacific Railway Co., 376 Ill. 59; Froehler v. North American Life Ins. Co., 374 id. 17." (Italics ours.)

The undisputed evidence bearing on plaintiff's status at the time he was injured is as follows:

Defendant's intestate during her lifetime operated the Gerdl Grocery & Market on Main street in Evanston, Illinois. The store was on the north side of the street facing south. There was a partition running through the center of the store from east to west, separating the front or south portion from the rear or north portion of the store. The grocery and meat departments were in the south or front room of the premises. In the front of that room were counters for waiting on customers. In the rear of this front room there was a counter which

1. Hotel "Krasnaya Zvezda" - 1945-1950
 2. Hotel "Krasnaya Zvezda" - 1950-1955
 3. Hotel "Krasnaya Zvezda" - 1955-1960
 4. Hotel "Krasnaya Zvezda" - 1960-1965
 5. Hotel "Krasnaya Zvezda" - 1965-1970
 6. Hotel "Krasnaya Zvezda" - 1970-1975
 7. Hotel "Krasnaya Zvezda" - 1975-1980
 8. Hotel "Krasnaya Zvezda" - 1980-1985
 9. Hotel "Krasnaya Zvezda" - 1985-1990
 10. Hotel "Krasnaya Zvezda" - 1990-1995
 11. Hotel "Krasnaya Zvezda" - 1995-2000
 12. Hotel "Krasnaya Zvezda" - 2000-2005
 13. Hotel "Krasnaya Zvezda" - 2005-2010
 14. Hotel "Krasnaya Zvezda" - 2010-2015
 15. Hotel "Krasnaya Zvezda" - 2015-2020
 16. Hotel "Krasnaya Zvezda" - 2020-2025
 17. Hotel "Krasnaya Zvezda" - 2025-2030
 18. Hotel "Krasnaya Zvezda" - 2030-2035
 19. Hotel "Krasnaya Zvezda" - 2035-2040
 20. Hotel "Krasnaya Zvezda" - 2040-2045
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 24. Hotel "Krasnaya Zvezda" - 2060-2065
 25. Hotel "Krasnaya Zvezda" - 2065-2070
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 28. Hotel "Krasnaya Zvezda" - 2080-2085
 29. Hotel "Krasnaya Zvezda" - 2085-2090
 30. Hotel "Krasnaya Zvezda" - 2090-2095
 31. Hotel "Krasnaya Zvezda" - 2095-2100
 32. Hotel "Krasnaya Zvezda" - 2100-2105
 33. Hotel "Krasnaya Zvezda" - 2105-2110
 34. Hotel "Krasnaya Zvezda" - 2110-2115
 35. Hotel "Krasnaya Zvezda" - 2115-2120
 36. Hotel "Krasnaya Zvezda" - 2120-2125
 37. Hotel "Krasnaya Zvezda" - 2125-2130
 38. Hotel "Krasnaya Zvezda" - 2130-2135
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 49. Hotel "Krasnaya Zvezda" - 2185-2190
 50. Hotel "Krasnaya Zvezda" - 2190-2195
 51. Hotel "Krasnaya Zvezda" - 2195-2200
 52. Hotel "Krasnaya Zvezda" - 2200-2205
 53. Hotel "Krasnaya Zvezda" - 2205-2210
 54. Hotel "Krasnaya Zvezda" - 2210-2215
 55. Hotel "Krasnaya Zvezda" - 2215-2220
 56. Hotel "Krasnaya Zvezda" - 2220-2225
 57. Hotel "Krasnaya Zvezda" - 2225-2230
 58. Hotel "Krasnaya Zvezda" - 2230-2235
 59. Hotel "Krasnaya Zvezda" - 2235-2240
 60. Hotel "Krasnaya Zvezda" - 2240-2245
 61. Hotel "Krasnaya Zvezda" - 2245-2250
 62. Hotel "Krasnaya Zvezda" - 2250-2255
 63. Hotel "Krasnaya Zvezda" - 2255-2260
 64. Hotel "Krasnaya Zvezda" - 2260-2265
 65. Hotel "Krasnaya Zvezda" - 2265-2270
 66. Hotel "Krasnaya Zvezda" - 2270-2275
 67. Hotel "Krasnaya Zvezda" - 2275-2280
 68. Hotel "Krasnaya Zvezda" - 2280-2285
 69. Hotel "Krasnaya Zvezda" - 2285-2290
 70. Hotel "Krasnaya Zvezda" - 2290-2295
 71. Hotel "Krasnaya Zvezda" - 2295-2300
 72. Hotel "Krasnaya Zvezda" - 2300-2305
 73. Hotel "Krasnaya Zvezda" - 2305-2310
 74. Hotel "Krasnaya Zvezda" - 2310-2315
 75. Hotel "Krasnaya Zvezda" - 2315-2320
 76. Hotel "Krasnaya Zvezda" - 2320-2325
 77. Hotel "Krasnaya Zvezda" - 2325-2330
 78. Hotel "Krasnaya Zvezda" - 2330-2335
 79. Hotel "Krasnaya Zvezda" - 2335-2340
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 84. Hotel "Krasnaya Zvezda" - 2360-2365
 85. Hotel "Krasnaya Zvezda" - 2365-2370
 86. Hotel "Krasnaya Zvezda" - 2370-2375
 87. Hotel "Krasnaya Zvezda" - 2375-2380
 88. Hotel "Krasnaya Zvezda" - 2380-2385
 89. Hotel "Krasnaya Zvezda" - 2385-2390
 90. Hotel "Krasnaya Zvezda" - 2390-2395
 91. Hotel "Krasnaya Zvezda" - 2395-2400
 92. Hotel "Krasnaya Zvezda" - 2400-2405
 93. Hotel "Krasnaya Zvezda" - 2405-2410
 94. Hotel "Krasnaya Zvezda" - 2410-2415
 95. Hotel "Krasnaya Zvezda" - 2415-2420
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 105. Hotel "Krasnaya Zvezda" - 2465-2470
 106. Hotel "Krasnaya Zvezda" - 2470-2475
 107. Hotel "Krasnaya Zvezda" - 2475-2480
 108. Hotel "Krasnaya Zvezda" - 2480-2485
 109. Hotel "Krasnaya Zvezda" - 2485-2490
 110. Hotel "Krasnaya Zvezda" - 2490-2495
 111. Hotel "Krasnaya Zvezda" - 2495-2500
 112. Hotel "Krasnaya Zvezda" - 2500-2505
 113. Hotel "Krasnaya Zvezda" - 2505-2510
 114. Hotel "Krasnaya Zvezda" - 2510-2515
 115. Hotel "Krasnaya Zvezda" - 2515-2520
 116. Hotel "Krasnaya Zvezda" - 2520-2525
 117. Hotel "Krasnaya Zvezda" - 2525-25

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was used in preparing orders for delivery. Behind this counter was the partition through which there was an entrance to the rear or north room of the premises. This rear room was used for supplies and as a shipping and receiving room.

Charles A. Davies and John Joseph Steigelman were the only occurrence witnesses and they both testified on plaintiff's behalf.

Davies testified in substance that he was manager of the Gerdl Grocery & Market on December 15, 1944; that he had known plaintiff for a long time, because Edwards was a customer and maintained a charge account at the store; that while he was in the front of the store behind the service counter about 3 or 3:30 p.m. on said date, Edwards came in and said to him, "Charlie, I would like a box * * * I want to send some goods for the holidays"; that he (Davies) replied, "All right, Joe is in the back, go back and see what you can find"; that boxes were given to regular customers and others without charge, if they were not needed "for our own deliveries"; and that prior to December 15, 1944 he sometimes saw Edwards go into the rear room and out through the west "entrance" of same into the alley to take a "short cut" to another store.

Steigelman testified in substance that he was employed at the Gerdl Grocery & Market on December 15, 1944; that on that day he was in the back room of the store "cleaning up"; that he happened to look around and saw plaintiff "coming in"; that he thought Edwards had a

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piece of paper in his hand; that "he came into the back room * * * looking for a box * * * he wanted to send away some Christmas things * * * and if I am not mistaken, he asked Charlie Davies * * * the manager, for a box"; that Davies said, "See Joe," meaning "me"; that when Edwards asked him about a box, he (Steigelman) said, "There is one"; that "he wanted to know if he could have it" and "I told him we were kind of short on boxes but seeing it was him * * * I would give it to him"; that he did not make any charge for the box; that "you have got to be courteous to the customer and if they ask you for a box, if you have it to spare, you let them have it"; that when Edwards was told that he could have the box, he asked, "Could I have a cover?" and "I says 'there are some pieces there'"; that Edwards picked up the pieces of wood and when he went to throw them "up in the box," he fell down the stairway and was injured; that he immediately went down the stairway to the basement and found plaintiff on the concrete floor; that Edwards "had a piece of paper * * * clutched in his hand"; that he opened plaintiff's hand and looked at the paper; and that "it was an order for groceries which he was to get * * * he always done the shopping himself."

In Wesbrock v. Colby, Inc., 315 Ill. App. 494, the court said (p. 497): "The rule of law is, that a person visiting a store for the purpose of transacting business in the same, is an invitee, and the owner of the store must use reasonable care to see that the premises are in a



reasonably safe condition, so that the customers visiting the store have a reasonably safe place to do their shopping. The rule is entirely different to a licensee of a store. If a person enters a store, not for the purpose of business, but on some personal errand, or if a person goes into a part of the store where customers are not supposed to be in the ordinary course of their business, then the person becomes merely a licensee, and the only duty that the storekeeper has to such licensee is, to not wilfully or wantonly injure the person." (Italics ours.)

The owner's liability for the condition of his premises is only coextensive with his invitation, and it is incumbent upon one claiming as an invitee to show not only that his entry upon the premises was by invitation of the owner, but also that at the time the injury was received he was in that part of the premises into which he was invited to enter, and was using them in a manner authorized by the invitation, whether expressed or implied. (Ryerson v. Bathegate, 67 N. J. Law 337, 51 Atl. 708, 57 L. R. A. 307; Southwest Cotton Co. v. Pope, 25 Ariz. 364, 218 P. 152; Brett v. Century Petroleum, Inc., 302 Ill. App. 99.) The distinction between a visitor who is a mere licensee and one who is on the premises by invitation turns largely on the nature of the business that brings him there rather than on the words or acts of the owner which precede his coming. (Milauskis v. Terminal Ry. Ass'n of St. Louis, 286 Ill. 547; Jones v. 20 North Wacker Drive Building Corporation, 332 Ill. App. 382.)



Was plaintiff an invitee when he entered that portion of defendant's store provided for the use of customers? We think that under the facts and circumstances in evidence this question must be answered in the affirmative. He had traded at the store for a number of years and had a charge account there. He usually did the marketing for his family and he purchased all of his groceries at defendant's store, if the items he wanted were available there. After the accident a paper was found in his hand which contained a list of groceries, presumably prepared by his wife. This evidence certainly tended to prove that plaintiff intended to purchase such groceries when he went to the store and that he would have purchased them, if he had not been injured in the rear room.

Is there any evidence in the record that tends to prove that plaintiff was an invitee at the time and place of his injury? In the light of the foregoing authorities we are impelled to answer this question in the negative. In reaching this conclusion we are mindful of the settled rule that if plaintiff presented any evidence that fairly tended to prove that he was an invitee at the time and place of his injury, then we would be precluded from holding to the contrary as a matter of law.

There can be no question but that plaintiff was clearly seeking a favor when he asked the manager of the store for a box and that he entered the rear room with the manager's permission still seeking that favor. It was after he was given a box that he fell down the stairway

leading from the rear room to the basement and was injured. Plaintiff, having been granted permission to go to the rear room of the premises to procure a box, for which he knew no charge would be made, went there solely for his own personal benefit and not for the common interest or mutual advantage of both himself and the defendant. It has been repeatedly held that the distinction between an invitee and a licensee lies principally in that an invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it. (Guest v. Wabash R. Co., 147 F. 2d, 579.)

In our opinion the only reasonable inference that can be drawn from the evidence is that plaintiff went to the rear room of the premises to get a free box and that being his purpose he was merely a licensee at the time and place of his injury.

Since it was incumbent upon plaintiff to prove as one of the essential elements of his cause of action that he was an invitee at the time of his injury and there is no evidence in the record that fairly tends to prove that he was an invitee when he was injured, it must be held that the trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

For the reasons stated herein the judgment of the Circuit court of Cook county is reversed.

REVERSED.

Friend, P. J., and Scanlan, J., concur.

44595

FREDERICK GERALD THOMAS,)
Petitioner,) ON PETITION FOR LEAVE TO
v.) APPEAL FROM ORDER OF CIRCUIT
GEORGE W. ROSSETTER, JAY C.) COURT OF COOK COUNTY GRANT-
McCORD and MAURICE A. ROSEN-) ING A NEW TRIAL.
THAL,)
Respondents.)

339 I.A. 647²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

On January 10, 1949 Frederick Gerald Thomas, plain-
tiff, had leave to appeal from the order of July 29, 1948
of the Circuit Court granting defendants a new trial.

Suit was first brought by plaintiff April 3, 1941 to
recover damages for libelous publication and distribution
among some one thousand persons of a letter, the pertinent
portions of which are as follows: "You must remember that
the U. S. Court of Appeals--3 judges appointed by the
President of the U.S.--in open court unanimously found him
[Thomas] guilty of being a cheat and a liar"; and "From
the fact that 3 U. S. Judges say that he [Thomas] is
dishonest." The trial of the cause was delayed by an
injunction procured by defendants June 2, 1941 from the
United States District Court (case No. 56875) restraining
plaintiff "from prosecuting or attempting to prosecute his
cause of action." That order was subsequently reversed by
the United States Court of Appeals, and the case came to
trial and on April 26, 1946 resulted in a verdict finding
defendants guilty and assessing plaintiff's damages at
\$75,000.00. After judgment was entered on the verdict de-
fendants moved for a new trial, which was taken under

advisement by the court and granted several months later on the ground that the damages were excessive. Petition for leave to appeal in the Appellate Court from that order was subsequently denied. The case was retried in the Circuit Court, and the second jury on May 6, 1948 found three defendants guilty and assessed plaintiff's damages at \$25,000.00. Following the return of that verdict defendants filed a motion for judgment notwithstanding the verdict, and in the alternative for a new trial or in arrest of judgment. Subsequently, on July 1, 1948, defendants secured an order allowing them to amend their motion for a new trial, and on the same day they filed their amendment setting forth as additional ground for the motion for a new trial that "the verdict is the result of passion and prejudice and is excessive." Later, on July 14, 1948, plaintiff moved the court to vacate the order of July 1, contending that notice of the motion had not been served upon him, which motion the court denied. At the same time an order was entered denying defendants' motion for judgment notwithstanding the verdict, finding the verdict excessive, and further ordering that a new trial would be denied if plaintiff consented to a remittitur of \$20,000.00 on or before July 30, 1948. On July 29, 1948 plaintiff advised the court that he was unwilling to accept or acquiesce in the remittitur, and thereupon the verdict was set aside and defendants' motion for a new trial was allowed.

Facts essential to a consideration of the issues involved disclose that prior to 1935 George W. Rossetter,



Jay C. McCord and Paul Steinbrecher were appointed in the Federal Court as trustees under a stock-voting trust agreement upon re-organization of the 4145 Broadway Hotel Company. Upon Paul Steinbrecher's death the defendant Maurice A. Rosenthal was chosen as third trustee. Jay C. McCord died December 12, 1948, after the second trial of this case, leaving only Rossetter and Rosenthal remaining as defendants.

Plaintiff, a real estate and insurance broker, first contacted the trustees in 1935 or 1936 when he submitted to them a series of propositions for leasing the hotel. One proposal specified a rental considered acceptable, but the proffered lessee declined to sign the lease, and thereafter the trustees refused to accept any of the other proposals submitted by Thomas. Subsequently, in 1937, plaintiff bought a trust certificate for five shares representing a \$500 bond at a cost of approximately \$25.00, which he used as admittance to the United States District Court in the 4145 Broadway Hotel Company bankruptcy proceeding, not then closed, filing numerous petitions containing accusations against the stock trustees of inefficiency and dishonesty, in an effort to obtain ouster of the trustees. These efforts were rebuffed by the court, and he was enjoined from sending further communications to and soliciting powers of attorney from the certificate holders or using powers previously procured. Thomas appealed from the injunction, which was affirmed by the United States Court of Appeals in In re 4145 Broadway Hotel Co., Thomas v. Rosenthal et al., 100 F.(2d) 7, and again affirmed in In re 4145 Broadway

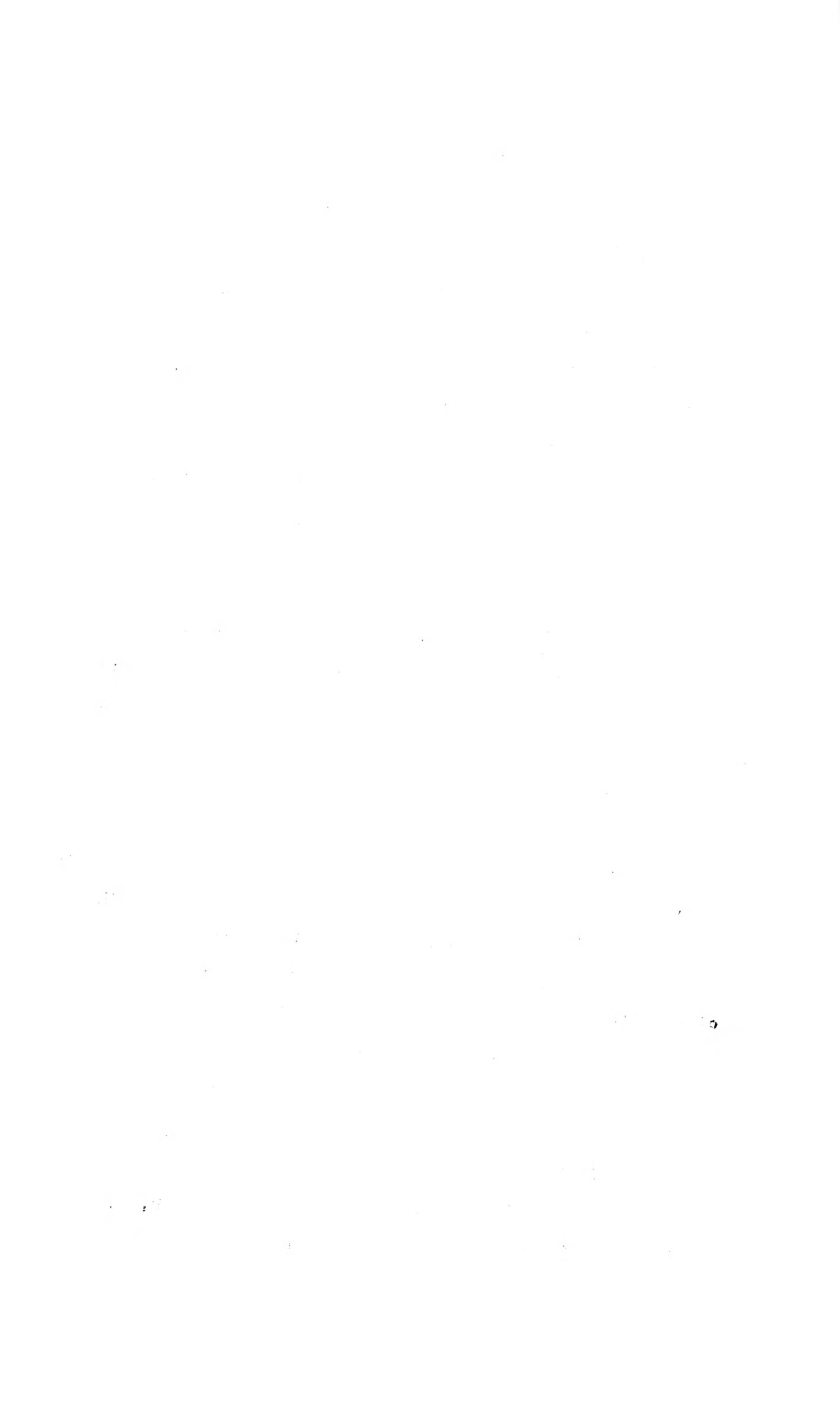
Hotel Co., Thomas v. Rossetter, 117 F.(2d) 639. In the course of the latter opinion the court said that Thomas' charges "were made for the purpose of compelling the trustees to enter into a lease with his client so that he could obtain commissions thereon." After affirmance of the injunctive order Thomas undertook, without avail, to bring about a termination of the stock trust by a vote of the certificate holders.

In 1940 the financial condition of the corporation was sufficiently improved to make possible the negotiation of a first-mortgage loan of \$110,000.00 to be used for the payment of back taxes in full and for rehabilitation of the hotel. The court approved the tentative plans which were successfully consummated and afforded promise of a resumption of the payment of dividends to certificate holders. About this time Thomas began to purchase shares of discouraged certificate holders for the nominal amount of one to two dollars per share, and when the stock trustees, with the approval of the court, submitted the mortgage and tax-payment program to the certificate holders for approval or disapproval, in accordance with the stock-trust agreement, Thomas attempted to use his powers of attorney to defeat the proposal. Dissents on one-third of the shares would have sufficed to block the proposal, and since Thomas had powers of attorney on more than one-third of the shares, the trustees considered it necessary to obtain a judicial determination regarding the validity of the powers held by him. Accordingly, when the trustees petitioned the court

for approval of the proposed mortgage, the district judge on August 6, 1940 entered a decree ordering consummation of the mortgage and tax-paying program, and held that all the powers of attorney held by Thomas were void because they had been obtained by material misrepresentations and omissions of material facts and in defiance of the injunction order of the district court which had been affirmed by the United States Court of Appeals. Thomas again appealed, and in reviewing the history of the proceedings and reaffirming the order (In re 4145 Broadway Hotel Company, Thomas v. Rossetter, 117 F.(2d) 639) the court said: "We find ample evidence of record that appellant Thomas 'deliberately, wantonly and brazenly violated and defied the injunction order of this (the district) court.'"

Subsequently, in February 1941, the stock trustees announced another biennial referendum to determine whether the trust should be terminated on May 1, 1941 or continued for two years. Notwithstanding the judgment of the Court of Appeals affirming the findings of fact and order of the District Court, Thomas again sought to rally sufficient votes to bring about a termination of the stock trust and a defeat of the mortgage and tax-payment program, consummation of which had been suspended pending the outcome of the litigation between Thomas and the trustees. In pursuance of that plan Thomas sent a circular letter, dated March 15, 1941, to certificate holders denouncing the trustees and the Federal courts, and stating that he intended to apply to the Supreme Court for a review of the

judgment of the Court of Appeals. About the same time, in an effort to circumvent the order of the Federal Court, he caused a shareholder of Eau Claire, Wisconsin, to deposit in the post office at Eau Claire a circular letter to the certificate holders that he had composed, printed, addressed, stamped and sealed in Chicago; enclosed with this letter, which bore the printed name Rose Mary King, were two post cards, one to be sent by the certificate holder to the trustees as a ballot in the referendum, and the other to be mailed to Thomas as a record of the vote cast by the certificate holder. On March 20, 1941 William Hodgson, a shareholder of the hotel company, wrote a letter to Rose Mary King in answer to the circular which he had received, in which he made the comments on the opinion of the Court of Appeals of which plaintiff complains. A copy of his letter to Rose Mary King was mailed to the trustees for their information. A few days later two of the trustees, Rossetter and McCord, met with Bernard Math and Harold Schloss, attorneys, and drafted a letter to the certificate holders in reply to the two Thomas letters relating to the referendum then in progress. Believing that the other certificate holders should have Hodgson's views on the subject, the trustees enclosed a copy of his letter with theirs, after obtaining Hodgson's permission to do so. In their letter they gave their reason for enclosing Hodgson's letter as follows: "We believe you will be interested in the enclosed excerpts from a letter written to Miss King from Mr. W. F. Hodgson, of Chicago, the registered holder of forty shares



of stock. We are not acquainted with Mr. Hodgson but he voluntarily sent us a copy of his letter to Miss. King." The trustees' letter was mailed to registered holders of certificates, and to no other persons, and was mailed out after the trustees had received legal advice that it was not libelous.

After verdict for \$25,000.00 in the second trial was returned on May 6, 1948, the court on July 29, 1948 granted defendants' motion for a new trial and the verdict was set aside. No judgment was ever entered. In granting a new trial, the court made the following remarks: "One would be compelled to resort to the most shameful speculation to think that the plaintiff was damaged, but very, very slight from such a letter. I don't think he was damaged. I don't think he thinks himself he was damaged. * * * I think that the verdict of the jury, which was manifestly high, was based upon prejudice, and I could account for a lot of prejudice, but I don't care to do so in this dissertation but I know of a great many elements or factors that went in to bring about a verdict which is not justified by the evidence."

It is urged on behalf of Thomas that the court improperly permitted the amendment of defendants' original motion for a new trial by allowing defendants to add that "the verdict is the result of passion and prejudice and is excessive." This additional ground was the basis upon which the motion for a new trial was allowed. The verdict for \$25,000.00 was returned May 6, 1948. May 14 defendants



moved for a new trial or in arrest of judgment or for judgment notwithstanding the verdict. On that day the argument of the motion was set for June 12, and later changed to July 1. July 1 counsel for defendants appeared, but plaintiff's counsel was not present in court because of some misunderstanding as to the date. Thereupon one of defendants' counsel left with the court the motion to amend the motion for a new trial, the amendment to the motion and a draft order allowing the amendment. He advised the judge he had not served copies on opposing counsel because he had assumed that plaintiff's attorney would be in court where copies could be given to him personally. The court took the papers but did not sign the order at that time. Subsequently copies of the papers were mailed to opposing counsel. Later the order granting defendants' motion to amend the motion for a new trial was signed by the judge. These facts were presented to the court on July 14, when the motion for a new trial was argued. The court heard both counsel and allowed the amendment. Under section 68 of the Civil Practice Act (Ill. Rev. Stat. 1947, ch. 110, par. 192) a party has the right to make a motion for a new trial at any time within ten days after judgment is entered, and under the Statute of Amendments and Joinders (Ill. Rev. Stat. 1947, ch. 7, par. 1) the court in which an action is pending has power to permit amendments in any process, pleading or proceeding at any time before judgment is rendered therein. No judgment was ever entered in the case at bar. Furthermore it is within the province of the trial judge to set aside a

verdict and grant a new trial if he is satisfied that the ends of justice so require. It was so held in the early case of City of Rock Island v. McEniry, 39 Ill. App. 218, and in the recent case of Grassle v. Knowles (Abst.), 317 Ill. App. 153. The court's power to do so is inherent, and exists apart from the statutory provision. People v. Preston, 345 Ill. 11; and In re Estate of Velie, 318 Ill. App. 550. In the Velie case the court stated: "It has been said: 'Notwithstanding the provision of the recently enacted Civil Practice Act authorizing an appeal from an order granting a new trial, the trial courts are, generally speaking, clothed with a discretion, as at common law, to be exercised in such manner as will best answer the ends of justice when granting motions for a new trial.'" (Citing authorities.) Thomas contends that by entering the order of July 1 without notice, he was denied due process of law; that under section 46 of the Practice Act no amendment can be allowed without leave of court; that the amendment was allowed in violation of rule 16, section 1, of the Circuit Court; that at no time did defendants support their notion for leave to amend by the required sworn explanation of why the matter proposed to be added was not inserted in their original motions for new trial; and that unreasonable delay alone is good ground for refusal by the court to exercise its power to permit amendment. We have read the decisions cited by plaintiff in support of the various points urged, but are of the opinion that under section 68 of the Practice Act and paragraph 1 of the Statute of Amendment in Jeofails the

trial judge had power to allow the amendment if he was satisfied that the ends of justice would be best served thereby.

Plaintiff does not contend that there was any evidence of actual damages, and the statement of the trial judge indicates that there was none. The question therefore presented is whether the verdict was grossly excessive and was the result of passion and prejudice. The court indicated that he "could account for a lot of prejudice" but that he did not care to do so "in this dissertation but I know of a great many elements or factors that went in to bring out a verdict which is not justified by the evidence." At no time did plaintiff request the judge to detail those factors, and it is a fair inference that he did not wish to have the court recite the details. Without such details we cannot say that the court abused his discretion in this respect. The courts of this state have consistently held that a trial judge has great latitude in passing upon a motion for a new trial, and that an order granting a new trial will not be disturbed unless the record clearly shows that the judge has palpably abused his discretion. Callos v. Public Taxi Service, Inc., 292 Ill. App. 399; Village of La Grange v. Clark, 278 Ill. App. 269.

The background of the publication and distribution of the letter which was sent out on the advice of counsel indicates lack of actual malice, and while this may not afford a legal defense, courts ought to exercise a high degree of watchfulness to prevent the doctrine of exemplary damages from being perverted and extended beyond the real

-11-

principles upon which it is based. Holmes v. Holmes, 64 Ill. 294; Eshelman v. Rawalt, 298 Ill. 192. We find no case in Illinois involving libel or slander in which such a large award of punitive damages has been sustained on appeal, and plaintiff cites none.

After careful consideration of the record presented, we have reached the conclusion that the trial judge did not abuse his sound discretion in granting defendants a new trial, and the order of the court is therefore affirmed.

Order granting defendants a
new trial affirmed.

Sullivan and Scanlan, JJ., concur.

44809

IN RE ESTATE OF ROBERT
NEWMAN, Deceased.

Appeal of ROSIE NEWMAN,
Respondent in Citation
Proceeding,

Appellant.

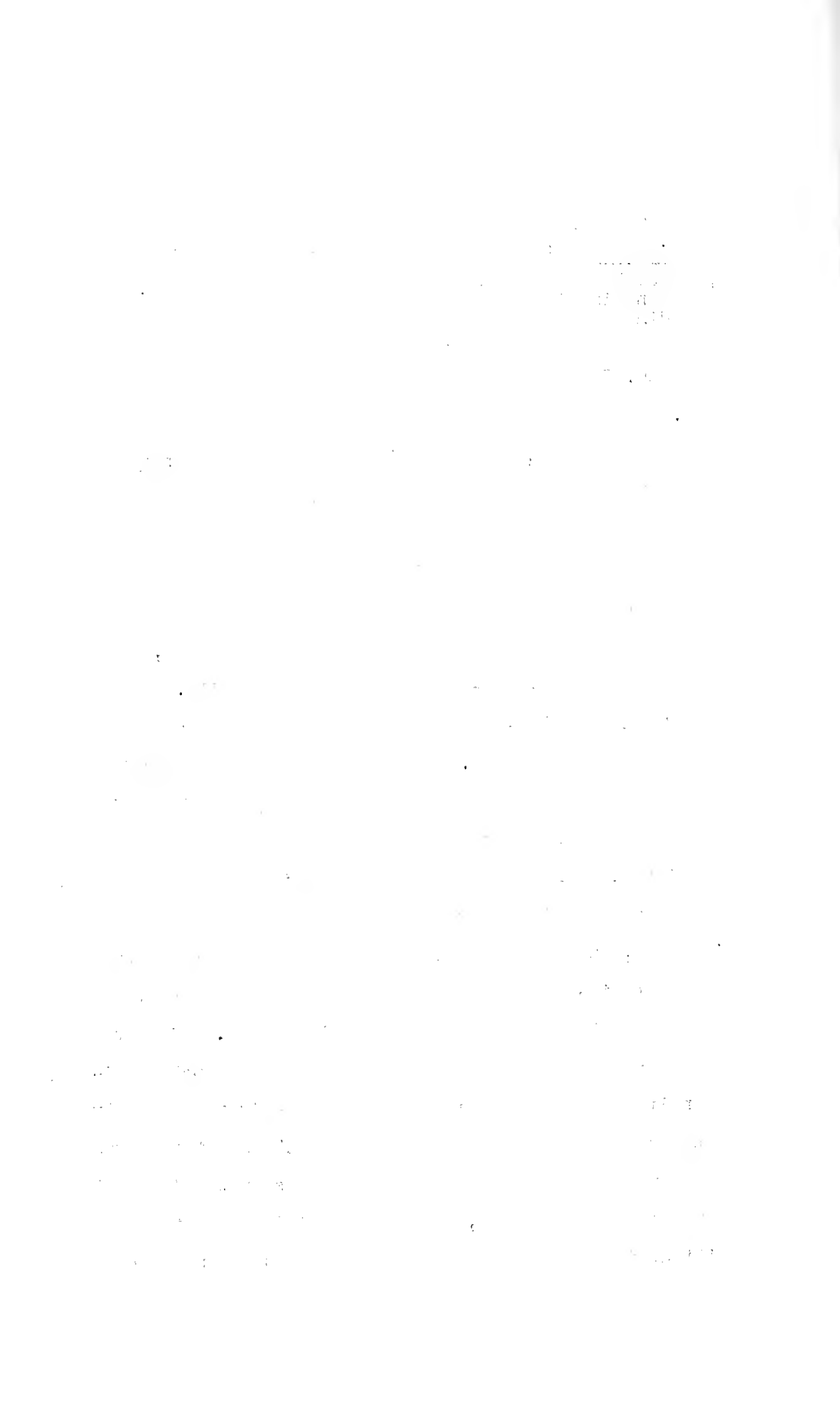
APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

339 I.A. 6481

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE
COURT.

George Burr, acting Administrator de bonis non of the Estate of Robert Newman, deceased, filed a verified petition in the Probate court of Cook county which alleges that he believes that one Rose Lackey, sometimes known as Rosie Newman, of Chicago, Illinois, has in her possession or control, or conceals or has converted, a certain automobile, "to-wit: Nash 1946 automobile, Factory No. R 422125, Engine No. R422125, and bears Illinois 1947 license No. 177-365, belonging to the said Robert Newman, deceased, and to his estate, and that said Rosie Newman wrongfully refuses to deliver the same to the undersigned." The petition prays "that the said Rose Lackey, also known as Rosie Newman, may be cited to appear before this Court, on a day certain, and compelled to answer such interrogatories as may be propounded to her touching the said automobile or other property in her hands, and that the proper order of this Court be entered upon such examination if it be found that such automobile is the property of the Estate of Robert Newman, deceased." A citation was issued and "Rosa Lackey, also known as Rosa Newman" (hereinafter called respondent), filed a verified answer to the petition, in which she admitted the possession and control



of the automobile and "she refuses to deliver the same to the alleged petitioner for the reason that said automobile is her own personal property or in the alternative she has a substantial interest in and claim upon the same." There was a hearing before Judge Waugh, Judge of the Probate court of Cook county, upon the petition and answer, and thereafter an order was entered that the automobile in question was the property of Robert Newman, deceased, and that it was being unlawfully withheld from the administrator de bonis non by respondent, and she was ordered to immediately deliver the automobile to said administrator. Respondent appealed from that judgment order to the Circuit court of Cook county, where there was a trial de novo before Judge Philip J. Finnegan. After he had heard the evidence of petitioner and respondent he entered an order that the automobile in question was the property of Robert Newman at the time of his death on February 18, 1947, and that the said automobile is now the property of the administrator of the estate of said Newman, deceased; that the respondent unlawfully withholds possession of the automobile, and respondent was ordered to deliver to said administrator the said automobile within fifteen days from December 22, 1948. Respondent appeals from that order.

Respondent contends "that she furnished the money to pay for said automobile with her own funds, and therefore said car at all times belonged to her independent of whose name the title was in; and in the alternative, her theory is that, having furnished the money for the car, she has a

substantial interest in it at any and all events." The undisputed evidence shows that Robert Newman, the deceased, purchased the automobile in question from the Chicago Nash Corporation and that all of the payments that were made upon the car were made by him. It further appears, without dispute, that on October 7, 1946, the deceased made an application to the Secretary of State for the title certificate and such a certificate was issued to him by that official. Respondent testified that on the day the car was purchased the deceased came to 4715 Greenwood, where she was working in the basement of that building for people by the name of Heck; that she then gave him \$500; that she made it from working and saving; that she and the deceased were alone when she gave him the money. She further testified that she gave the deceased another \$500 on October 7, 1946. Asked by the trial court where she got that money, she testified that about two weeks before she gave the deceased the second \$500 she "played a gig and I caught policy; and I won \$700.00 on the gig." Respondent testified that she knew before the death of Newman that the car was in his name but that the deceased told her the week before he died that "we will go down and get the title straightened out. I said 'O.K.'" She testified that she was not married to Newman and "was no relative of his," but that they lived together as man and wife; that the deceased called her "Pretty Pie" and that he said "we will go down and I am going to have the Title made over to you as you furnished the money for the car." Respondent called as

-4-

witnesses five women, each of whom testified that the deceased had made statements to them to the effect that respondent gave him money to pay on the car. After the death of Newman respondent filed, on March 15, 1947, the following verified petition with the Secretary of State of the State of Illinois:

"AN AFFIDAVIT TO EDWARD J. BARRETT
THE SECRETARY OF STATE OF THE STATE
OF ILLINOIS BY THE HEIRS OF

ROBERT NEWMAN, Jr DECEASED.

"The heirs of the late Robert Newman, Jr
under oath depose and say:

"1. That on Feb. 18 1947, Robert Newman, Jr
name of

Decedent, residing at 4753 Calumet
address

Chgo
city, Illinois, died intestate (evidenced by
a death certificate herewith presented) leaving surviving,

ROSIE NEWMAN
names of all heirs

who are his his her only heirs at law.

"2. That the personal estate of the decedent at the time of his death was less than \$1000.00 in value.

"3. That there are no outstanding debts of the decedent, including funeral expenses, now unpaid.

"4. That no application for letters testamentary or letters of administration has been made.

"5. That thirty (30) days have elapsed since the death of the decedent.

"6. That included as part of the personal estate of the decedent is a Nash, Sed., 1946
name of car body type year built

R 422125, R 422125, last licensed in the
serial number motor number

State of Illinois in 1947, license number 177365.

"7. That the heir or heirs of the said Robert
Newman, Jr, herewith petition Edward J. Barrett,
the Secretary of State of that State of Illinois, to issue
a Certificate of title in the name of Rosie Newman in
order that the said motor vehicle may be lic [licensed].
licensed or sold

[Signed] " X Rosie Newman)
_____) SIGNATURES
_____) OF
_____) ALL HEIRS"
_____)

From the foregoing affidavit of respondent it appears
that she stated that the automobile in question was a part
of the personal estate of the decedent, and that she was
petitioning the Secretary of State to issue a certificate
of title in the name of Rosie Newman upon the ground that
she was the widow and only heir at law of the decedent. It
is admitted that she was not the widow of Newman and it is
clear that she was not even an heir at law of Newman.

While respondent testified that Newman drank and
idled, it was stipulated that the deceased worked for the
Meyer Card Company from October 8, 1945, to February 7,
1947; that his earnings from October 8, 1945, to December
31, 1945, were \$515.25; that his earnings for the year
1946 were \$2,194.91, and that his earnings from January 1,
1947, to February 4, 1947, were \$223.83. Newman, therefore,
was working until two weeks before he died. We are not
surprised that the judge of the Probate court and the judge

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of the Circuit court did not believe the testimony of respondent and her witnesses.

After a careful consideration of the testimony of respondent and her witnesses we are satisfied that it is entitled to little, if any, credence.

In the case of Goodman v. McLennan, 334 Ill. App. 405 (App. Den. by the Supreme court, 400 Ill. 627), we stated (pp. 418, 419):

"Petitioner's case is based upon the testimony of the foregoing witnesses, and the material parts of their testimony relate to alleged statements and admissions by McLennan. Before taking up facts and circumstances in evidence that respondent contends show clearly that the evidence of Miss Burke, Schoen and Lederer is 'fabricated,' we will refer to the law that bears upon the testimony of said witnesses for petitioner. Many years ago the Supreme court of the United States (Lea v. Polk County Copper Co., 62 U. S. 493, 504) stated that '* * * courts of justice lend a very unwilling ear to statements of what dead men had said.' In Keshner v. Keshner, 376 Ill. 354, 363, our Supreme court made a like statement and added 'that such evidence is subject to great abuse and that it will be carefully scrutinized as well as considered with all the other evidence in the case. (Megginson v. Megginson, 367 Ill. 168, 180; Fierke v. Elgin City Banking Co., 366 id. 66.)' In Megginson v. Megginson, 367 Ill. 168, 180, the court states: 'We have recently had occasion to observe that the evidence of admissions made by persons since dead

should be carefully scrutinized and considered with all the evidence in the case, as it is likely to be abused. Fierke v. Elgin City Banking Co., 366 Ill. 66; Moreen v. Estate of Carlson, 365 id. 482.' Many decisions of the sister States, to the same effect, might be cited if it were necessary, but the rule of law announced in the foregoing cases is well settled. If that rule did not prevail no estate would be safe from dishonest claims."

We are satisfied that the judgment of the Circuit court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

44921

CITY OF CHICAGO,
Appellee,
v.
HAROLD SCHLENSKY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

339 I.A. 648²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant was charged with violating Section 61-21 of the Municipal Code of Chicago. By agreement a jury was waived and the cause submitted to the court, resulting in a finding of guilty, assessing a fine of \$25.00, and providing in the judgment that defendant be imprisoned in the House of Correction in the event of nonpayment of the fine, from which judgment defendant appeals.

The principal question urged upon this appeal is that the complaint wholly fails to charge an offense and is therefore void; that the complaint does not apprise defendant of the nature of the charge against him.

The complaint charged in substance that defendant was the owner of, maintained, and controlled the premises at 6434 Cottage Grove Avenue, Chicago, which is a four story hotel of ordinary construction, and that he failed to complete all work necessary to bring said hotel in compliance with Section 61-21 of the Municipal Code of Chicago. There is no report of proceedings, and the record does not disclose any objection made to the complaint before trial, nor any motion for a bill of particulars or a more specific complaint.

2.

An action by a city to recover a penalty for the violation of an ordinance is a civil suit and the rules applicable to criminal procedure have no application thereto. City of Chicago v. Williams, 254 Ill. 360, 363.

Rule 37 of the Civil Practice Rules of the Municipal Court of Chicago provides:

"(3) All defects in pleadings, either in form or substance, not objected to in the trial court prior to trial, shall be deemed to be waived. (Civ. Prac. Act, Sec. 42 (3).)"

In City of Chicago v. Wernecke, 306 Ill. App. 514, 517, it was held:

"If the complaint was insufficient in failing to point out the particular charge made against defendant, this defect could have been obviated by motion for a more specific statement."

The attack made against the complaint for the first time on this appeal is without merit. Other objections raised and argued we deem without merit and unnecessary to discuss.

The judgment is affirmed.

AFFIRMED.

Niemeyer, J., concurs.

Tuohy, P. J., took no part.

44678

MARY GENEVIEVE RABE, individually
and as Executrix of the Last Will
and Testament of LOUIS F. RABE,
deceased,

Appellant,

v.

MAGDALENE B. RABE, individually
and as Executrix of the Last
Will and Testament of FRIEDERICKE
RABE, deceased, LUCY A. RABE and
FRED H. RABE,

Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

339 I.A. 649

Plaintiff's notice of appeal, consisting of 23 pages of a 500-page abstract, seeks a review of proceedings, decisions, orders and a decree of the Circuit Court involving litigation and transactions dating back to 1921. The abstract is replete with pleadings of forbidding length, affidavits, exhibits, notices, motions with rulings thereon, and some 35 orders. Only 69 paragraphs of defendants' answer are abstracted; the remaining portion thereof which sets forth the sole defense of res adjudicata, is entirely omitted, as are 23 exhibits introduced in support of that defense. It is hardly surprising that two short paragraphs, running to less than a page of her brief, which set forth plaintiff's statement of the case, are utterly insufficient to acquaint the court with the matters presented for review, and we have therefore adopted the statement in defendants' brief containing accurate record references, some of which have been supplied by their additional abstract.

Frederick L. Rabe died February 7, 1921, intestate, leaving him surviving his widow Friedericke and his four

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children Magdalene, Lucy, Fred and Louis as his only heirs at law and next of kin. His estate was probated in the Probate Court of Cook County. The inventory in his estate, duly filed and approved, disclosed eight piece of real estate and the following personal property: cash, \$541.91; note of Louis F. Rabe, \$2000.00; and note of Dorothea Rabe, \$50.00. On June 22, 1922 the final account of the administratrix was approved, and she was discharged. The widow and all the children filed their appearance and consented to the approval of the final report and account of the administratrix. The note of Louis F. Rabe for \$2000.00, shown in the inventory, was assigned by all the children, including Louis, to their mother Friedericke. This disposed of all personal property, as the inventoried cash was used to pay costs, expenses, etc., and the note of Dorothea was worthless.

By deed dated April 26, 1921, recorded April 27, 1921, the four children, together with the respective spouses where there were such, conveyed all of the real estate to their mother Friedericke. Simultaneously, on April 27, 1921, Friedericke executed a deed wherein she conveyed to Louis one-fourth of the same real estate that was conveyed to her by the four children. The partition decree, more fully discussed hereinafter, found that this conveyance was made upon the oral understanding and agreement that the deed should have no force or effect until after the death of Friedericke, and that pursuant to such agreement the deed was deposited in escrow with Leonard C.

Reid and retained by him until after Friedericke's death. The agreement was that it should not be recorded during the lifetime of Friedericke, and it never was recorded.

The dispute as to the deed from Friedericke to Louis presents the gravamen of the present controversy. Plaintiff claims it became effective immediately upon its execution, and that Louis became the owner of an undivided one-fourth of the real estate at that time, namely, on April 27, 1921. Defendants contend that it did not become effective until the date of Friedericke's death on January 3, 1931. On December 28, 1940, more than three years prior to the filing of this supplemental and amended additional complaint which is the basis of the suit here under consideration, a partition suit was instituted, and after a full hearing the court decreed that by virtue of the said deed from the children to Friedericke she "thereby became seized in fee of the whole of said premises" and was so seized at the time of her death; that Friedericke executed the deed to Louis with the understanding and agreement that it should not be delivered or recorded and should have no force or effect until after her death. In effect it held that Louis did not become the owner of an undivided one-fourth until the date of Friedericke's death. The partition decree was affirmed by the Supreme Court in Rabe v. Rabe, 386 Ill. 600.

In the instant suit plaintiff claims that Louis is entitled to an accounting for the rents from the date of the deed, executed April 27, 1921, from Friedericke to

Louis. Defendants, on the contrary, claim that he was entitled thereto only from the date of Friedericke's death on January 3, 1931. The court sustained defendants' position. A full accounting was made in the partition suit respecting all rents subsequent to Friedericke's death. ✓ }

During her lifetime Friedericke disposed of three pieces of real estate, but at her death was still the owner of the other five. She died testate, leaving the same four children as her only heirs at law and next of kin. Her will was approved and her estate probated in the Probate Court of Cook County. By her will she left her estate to three of the children, excluding Louis. The will stands approved, and the partition decree adjudicated that the three children became the owners of her estate under the terms of the will, and excluded Louis.

An inventory was filed in Friedericke's estate, and on July 30, 1943 the account of the executrix was approved and she was discharged. Notice was served on Louis' counsel, who is also counsel for Louis' executrix in this suit, of the presentation of the final account and request for approval thereof. No objections were filed.

On February 2, 1932 Louis filed a bill of complaint, bearing general No. B-236475, against the other three children, contesting Friedericke's will. This was the origin of the instant proceeding. On June 29, 1942, more than ten years thereafter, the will contest was dismissed for want of prosecution. Meanwhile, however, other plead-

ings had been filed and the court retained jurisdiction with respect to them. Subsequently, June 9, 1944, plaintiff filed a supplemental and amended additional complaint which covers pages 11 to 71 of the abstract. Defendants answered each one of the numerous paragraphs, and then set up fully the separate defense of res adjudicata, on which a hearing was had.

In the partition suit, filed December 28, 1940, the parties were identical with those in this proceeding, but their positions as plaintiffs and defendants were reversed. Louis, as defendant in the partition suit, filed his answer, to which plaintiffs filed their reply. After a full hearing before a master in chancery and arguments before the court on exceptions to the master's report, the decree was entered adjudicating, inter alia: (1) that by their deed of April 26, 1921 the four children conveyed the premises in question to Friedericke, and "she thereby became seized in fee of the whole of the premises [i.e., the five pieces of real estate]"; (2) that being so seized and possessed of said premises; Friedericke died leaving a will which was duly authenticated to pass real estate, and by which she devised the premises to Magdalene, Lucy and Fred; (3) that she executed the deed to Louis with the understanding and agreement that it should not be delivered or recorded, and should have no force or effect, until after her death; and (4) that therefore the four children became the owners in equal parts of said real estate after Friedericke's death.

As above stated, the note of Louis for \$2000.00 had

been assigned to Friedericke. On March 29, 1932 the executrix of Friedericke's will recovered a judgment against Louis for \$5807.20 and costs, and on May 3, 1939 this was revived. Plaintiff claims in the instant suit that said judgment was wrongfully obtained, fraudulently confessed and was not a lien on Louis' interest in the premises. The same claim was made by Louis in his answer in the partition suit. The decree in the partition suit adjudicated that said judgment was valid and a lien on the right, title and interest of Louis in and to said premises. Pursuant to the decree of sale in the partition suit the property was sold to Magdalene, Lucy and Fred. On November 12, 1942 a decree confirming said sale was entered, and the cause was re-referred to the master to take testimony on the question of distribution. A hearing was had before the master, and on March 15, 1943 he filed a report of distribution which on March 30, 1943 was approved by the court.

In his report the master found that the litigants were entitled to have an accounting of the rents for the period beginning January 3, 1931, the date of Friedericke's death, to October 7, 1942. Testimony was heard, and such accounting was made. The master found that the net income available for distribution was \$25,624.88, and that the proceeds of the sale of said real estate were \$47,600.00, a total of \$73,224.88. From this there was deducted \$3637.60 attorneys' fees, master's fees and costs, leaving a net of \$69,587.28 for distribution. The master found that during the period beginning January 3, 1931 and ending October 7,

1942, Louis received advances amounting to \$6406.42, and that this amount, together with the amount necessary to pay the judgment for \$5807.20 and \$15.00 costs against Louis, should be deducted from Louis' share, and that there should be paid to Louis \$2627.73. This amount was paid to Louis. Thus it was adjudicated that Louis was not entitled to any accounting for rents during his mother's lifetime because he had no ownership or interest in the property. It was also decided that he was entitled to an accounting for rents after her death, and he obtained the accounting and his share.

In the instant proceeding plaintiff also raises the point that another action, namely, the instant one, on pleadings prior to the filing of the supplemental and amended additional complaint, was pending, and that therefore the partition suit should have been dismissed. The same point was raised in the partition suit; it was adjudicated against defendant in that suit (Louis) and specifically affirmed by the Supreme Court in Rabe v. Rabe, supra.

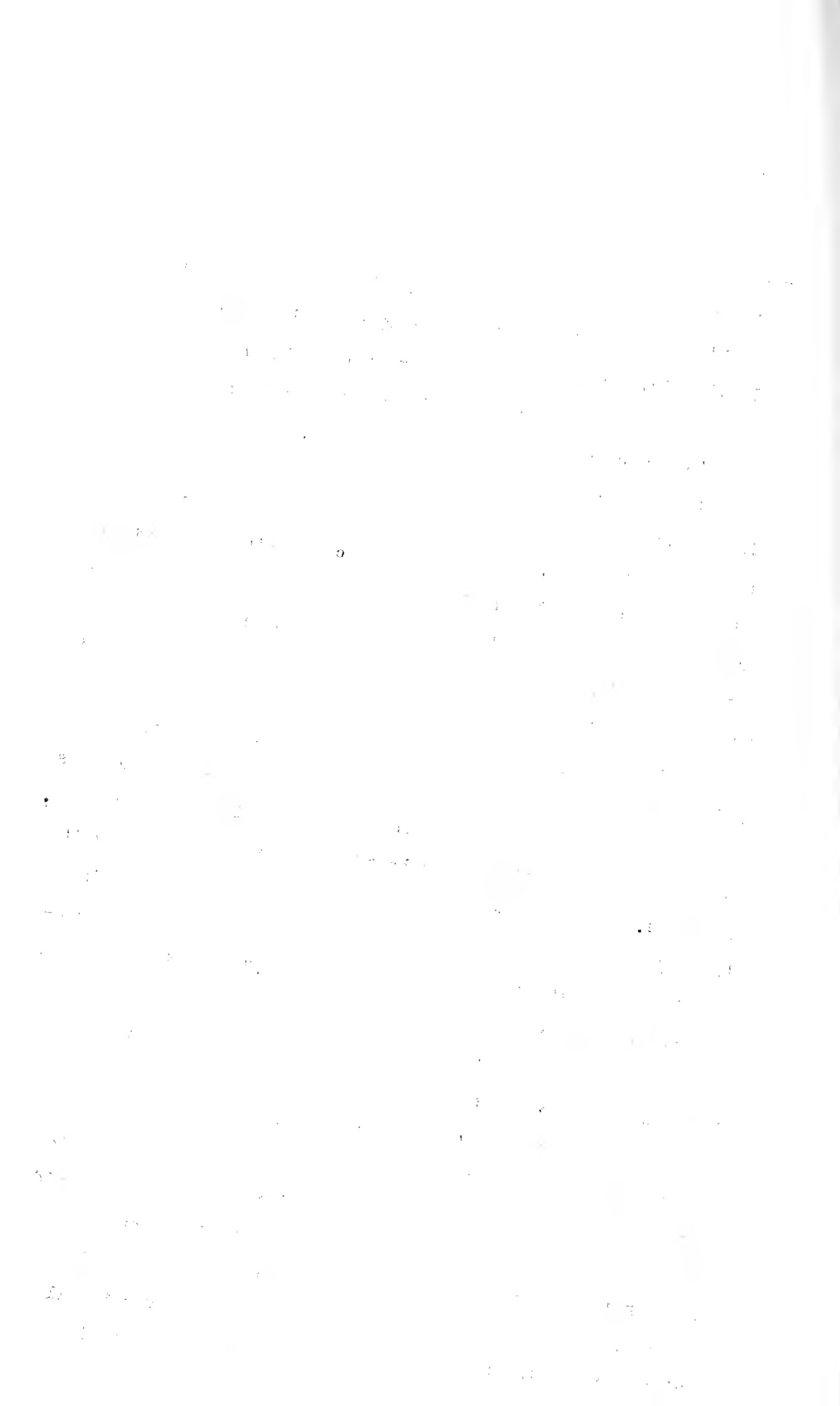
Plaintiff feels aggrieved because defendants have not argued any of the twelve "Errors Relied on for reversal of the decree of May 13, 1948 and for the entry of the corrected judgment and decree." and also because defendants have not disputed the correctness or applicability of anything stated in the 35 points and authorities of plaintiff's brief. The obvious reason is that under defendants' contention the decree in the partition suit,

affirmed by the Supreme Court, finally adjudicated all questions raised by plaintiff and all her claims in the instant suit. In fact, res adjudicata is the sole defense to the instant suit, and defendants' brief contains a concise but effective argument to support that defense. If, as they contend, the decree in the partition suit finally adjudicated all questions raised by plaintiff, a discussion and consideration of other points would be superfluous.

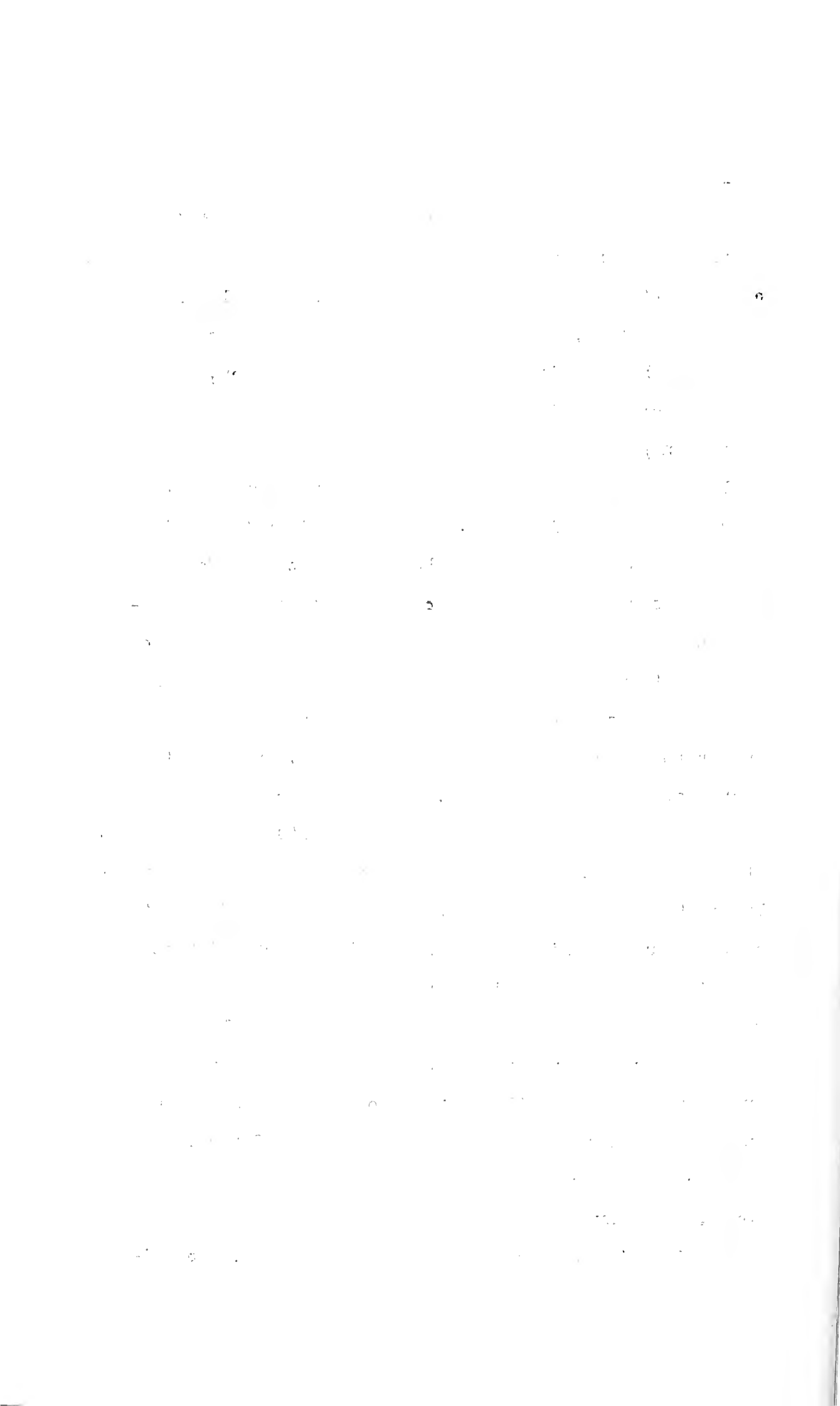
The partition decree adjudicated the four controlling issues enumerated earlier in this opinion. Louis' motion of March 26, 1942 to vacate the decree of partition was overruled by the court May 18, 1942, and within the year a decree of sale was entered, a sale made, and the master's report of sale filed. All of these proceedings were objected to by defendant, the objections were overruled November 12, 1942, and a decree confirming the sale was entered. Subsequently, in February 1943, a hearing was had before the master as to the distribution of the proceeds of the sale and for an accounting, to which, on March 9, 1943, defendant filed objections, which were ordered to stand as exceptions, and on March 30, 1943 they were overruled by the chancellor, and the report of the master on distribution and accounting was affirmed. Later, on April 28, 1943, defendant made a motion to vacate and set aside previous orders and decrees and to dismiss the partition suit, and that motion was overruled. Thereupon defendant took an appeal to the Supreme Court. In his notice of appeal to that court he sought to vacate all the previous decrees entered in the

case prior to the final order approving the order of the master's distribution on the accounting. The Supreme Court held that "The decree of partition entered in the cause was a final order. The decree of the court confirming the master's report of sale was a final order. The time in which to take an appeal from both of such decrees had long since passed at the time defendant gave his notice of appeal in the present case. Where a decree of partition definitely settles the interests of the parties and appoints commissioners to make partition it is a final decree, and if any of the parties are dissatisfied with it an appeal should be taken in accordance with the statute, as such decree cannot be questioned upon an appeal from a subsequent decree ordering a sale of the premises. Under such circumstances, one who does not appeal from a decree finding the interests of the parties, and ordering a partition, is bound by it and concluded by its findings. The same rule is applicable to a decree ordering the sale of the premises, and to the decree of the court confirming the master's sale of the premises." (Citing cases on all of the conclusions reached by the court.)

Under the holding of the Supreme Court as to the matters heretofore set forth, there remained for consideration only defendant's (Louis') objections to the decree entered March 30, 1943, and the motion of April 28, 1943 to vacate prior decrees. As to these objections the court said: "The former [the decree] approved the master's accounting between the parties and the distribution of the proceeds of the sale. The latter seeks to set aside and vacate all prior decrees in the case. No question is raised in the



briefs of appellant [defendant Louis or his executrix] as to the power and authority of the court to settle the rights of the parties to the funds derived from the sale of the premises in the partition suit. Appellant attempts to question the validity of the decree of partition, as well as the decree confirming the sale, and to dismiss the partition proceedings. As pointed out, these questions could not then be raised, as defendant was bound by their provisions as final orders, because he did not appeal from them. The same question of the pendency of the former lawsuit is raised in the motion to vacate the decree approving the account. The appellant is also concluded on this question because she is raising the same question of the pendency of the prior suit that defendant raised in the answer to the complaint of the plaintiffs, and to entering decree of partition and sale. When the decree of partition was entered by the court, fixing the rights of the parties, its jurisdiction to proceed was adjudicated and consequently if the defendant was not satisfied with the judgment of the court in this respect he had his opportunity to appeal when it became final on May 18, 1942, more than a year prior to the filing of the notice of appeal in this case. The remaining questions in the last motion filed by defendant involve the accuracy of the accounting for purposes of distribution and are questions of fact. The evidence was heard before the master and confirmed by the court. Lengthy suggestions are made as to the improper manner in which the accounting was carried out. No evi-



dence was offered by defendant. Under such circumstances the master and trial court are in a better position than we are to determine such questions. We find no merit in the appeal of the defendant either upon questions of law or upon consideration of the facts. The decree of the circuit court of Cook county is affirmed."

The gist of the instant proceeding is to obtain an accounting for the rents from the date of the deed from Friedericke to Louis on April 27, 1921. However, the court sustained defendants' contention that plaintiff was entitled to an accounting only from the date of Friedericke's death on January 3, 1931. A full accounting having been made in the partition suit respecting all rents subsequent to Friedericke's death on January 3, 1931, there remains only the ten-year period preceding her death for which any accounting could be claimed. The court sustained the position of Magdalene, Lucy and Fred as to the period during which Louis was entitled to an accounting, and the Supreme Court affirmed the decree and held that it was final.

Clearly plaintiff had no right to an accounting from these defendants as to anything in connection with the father's estate, and her counsel make no such claim. The personal property in that estate was assigned to the mother, and the real estate conveyed to her by the four children. Likewise there is no right to an accounting against these defendants in connection with Friedericke's estate. By reason of the assignment and deed from the children, Friedericke became the owner of all that was left

by her deceased husband. This was adjudicated by the partition decree, and affirmed on appeal. From the date of the deed to her, Friedericke collected the rents; defendants did not collect them. When Friedericke died her executrix filed an inventory which listed all the property belonging to Friedericke, including the real estate. Whatever net was left from the rents collected by Friedericke during her lifetime was included in the form of bonds, mortgage, etc., and shown as such in the inventory. Louis made no objections of any kind, but in the instant suit he claims that defendants, who did not collect the rents, should account to him for rents that Friedericke received and retained because of her ownership of the real estate by virtue of the deed from her children.

After careful consideration of the questions raised, we are impelled to hold that the identical issues in the instant case were adjudicated in the partition suit. Plaintiff's counsel make no attempt whatsoever to answer defendants' arguments in support of their sole defense of res adjudicata; they completely ignore the point.

For the reasons indicated we hold that plaintiff is barred from the relief sought. The decree of the Circuit Court is affirmed.

Decree affirmed.

Scanlan, J., concurs.
Schwartz, J., took no part in the consideration or decision of this case.

44797

FRANK PABLOCKI,
Appellant,

v.

THOMAS A. VIVIANO and
JOHN VIVIANO,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

3391A.650¹

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Plaintiff brought an action to recover damages for personal injuries sustained when he was struck by an automobile driven by the defendant Thomas A. Viviano. The jury returned a verdict of not guilty, and after the denial of plaintiff's motion for a new trial, judgment was entered on the verdict, and plaintiff appeals.

The salient facts disclose that about 11:15 p.m. on April 2, 1946, plaintiff was driving his automobile south on Harlem avenue in Chicago. As he approached intersecting School street he noticed an automobile stalled on Harlem avenue, approximately twenty feet north of School street, in about the center of the two southbound lanes. Passengers in plaintiff's automobile at the time were his wife Anna Pablocki, his daughter Mrs. Stanley Glisczinski, both of whom were in the back seat, and his daughter-in-law Angeline Pablocki who, with an infant child, was in the front seat next to plaintiff. Their testimony, together with that of plaintiff and police officers who took statements after the accident, was adduced on behalf of plaintiff upon trial. The defendant Thomas A. Viviano testified in his own behalf.

There is considerable conflict in the evidence

as to the position of the stalled automobile and the manner in which the accident occurred. Mrs. Pablocki, plaintiff's wife, testified that there was a car without lights standing at an angle, straddling the two southbound lanes; that as they passed the car her husband drove to the curb, and together with his daughter, got out with flashlights and went back to examine the car; that she saw an automobile coming from the north a block or a block and a half away; that when her husband got to the parked car, he went to the left-hand or driver's side of the car; that the approaching car was swaying, both she and her daughter screamed, and suddenly her husband was struck by defendant's car. She stated that "my husband was in the center of the standing auto when he was struck. He was in the center of the driver's side standing still looking inside the car."

On cross-examination she testified that the unattended automobile was at an angle and straddled the southbound lanes, the front end heading southwest and the back end northeast, and that it was the right-hand side of the southbound car that came in contact with her husband.

Plaintiff's daughter-in-law Angeline Pablocki, was in the front seat and saw the stalled automobile in the road. She stated that it was parked southeast at a sort of angle. On cross-examination she testified that the parked car was facing southeast with the back to the northwest; that when plaintiff's car passed the standing or stalled automobile, they went to the right of it or out to the curb. Plaintiff's daughter Mrs. Glisczinski,

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who was in the rear of plaintiff's car, stated that the stalled car was facing southeast, and that when her father reached it he "stayed by the middle on the left side and I walked to the rear of the car." On cross-examination she testified that it was dark, that the stalled automobile was facing southeast; that they drove by it, turning off to their left to the center of Harlem to get around it; that her father was in the middle of the stalled car and she was on the left-hand side of the car, in the rear; that the stalled automobile was facing southeast at an angle; that her father was on the driver's or left-hand side of the door, on the same side she was, but by the door in the middle of the car.

Frank Pablocki, the plaintiff, testified on his own behalf that as he approached School street he observed the stalled automobile, noticed that it had a smashed fender, and that it was about four feet off the center of Harlem avenue; that he stopped his car on the west curb of Harlem avenue, and he and his daughter took flashlights and went over to investigate; that he went to the left-hand side of the car, opened the door and flashed the light, and was closing the door with his left hand when he was hit by defendant's car. On cross-examination he stated that the stalled car was headed a little to the southeast; that he drove around it to the right, between the back of the car and the west curb; and that he did not see defendant's car before the accident.

James Gilbert, a police officer, testifying on



behalf of plaintiff, stated that when he arrived at the scene of the accident he took statements from the various witnesses of plaintiff as well as from defendant, made a test on Viviano's car and found the brakes to be in good condition, and that upon examination of defendant's automobile he observed a brush mark on the right front fender. Ernest Bauer, another police officer, likewise examined defendant's car and found no damage other than a brush mark on the right front fender.

As against these witnesses Thomas Viviano, testifying on his own behalf, stated that on the night of the accident he was alone in his car, driving south on Harlem avenue in the lane next to the center; that his driving lights were on and that he could see ahead distinctly; that he was traveling about thirty to thirty-five miles an hour with no traffic immediately ahead of him, and that as he approached School street he observed an automobile out in the street parked with its right front wheel about two or three feet from the west curb and its rear protruding some two or three feet into the inner southbound lane; that it was on an angle; that there was no one out on the roadway or on the pavement as he turned his car and drove up to and past the stalled automobile. He stated that he had to swerve a foot or two across the center line of Harlem avenue to avoid striking the stalled car, and that his automobile did not touch the parked vehicle at all; that he was driving in a straight line in the center inner lane and did not do any zigzagging; that as he passed the back

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end of the stalled automobile he felt a bump on his right fender, but did not see anybody at that time. However, he did hear a woman scream, then parked his car just ahead of another car parked on Harlem avenue south of School street, which he later found was the Pablocki car, and when he went back Mr. Pablocki, the plaintiff, was lying on the south side of the stalled automobile and west of the east end or the back of the stalled car. According to Viviano the front end of the stalled automobile was about two feet away from the west curb, and there was not enough room for a car to pass between the west curb and the right-hand side of the car.

It is plaintiff's principal contention that the verdict of the jury was contrary to the manifest weight of the evidence. His counsel argue that in many important respects defendant's testimony was inherently improbable, and that the question as to whether the defendant was negligent or exercised due care, seems to have been resolved by the jury on defendant's testimony. However, from the foregoing summary of the evidence, it appears there was a wide divergence of testimony among plaintiff's witnesses as to how the stalled automobile was standing and as to where the plaintiff was standing.

It is also urged that Viviano had an unobstructed view of plaintiff, that he could have looked and seen the danger, and not having seen plaintiff and slowed down, he was not exercising ordinary care and was therefore guilty of negligence. If, as defendant testified, the stalled

car was facing southwest and plaintiff was standing on the left thereof, examining the interior with a flashlight, as some of his witnesses testified, it is readily conceivable that he was hidden from defendant's view. Viviano testified that he was watching the road, driving in a straight line, did not see plaintiff and did not know that he had struck anything until he felt a thud just as he passed the stalled automobile. In any event, all these circumstances were factual questions submitted to the jury for decision, and in view of the divergence of testimony among plaintiff's witnesses, it was for the jury under proper instructions to decide whether plaintiff was in the exercise of due care for his own safety and whether defendant was negligent as charged.

The only other ground urged for reversal is that defendant's instructions No. 4, 6 and 7 were prejudicial and misleading. In his motion for a new trial plaintiff particularly specified instructions No. 4 and 7; No. 6 was not criticized or assigned as being erroneous, and therefore requires no comment. Krug v. Armour & Co. (Abst.), 335 Ill. App. 222; Pajak v. Mamsch, 338 Ill. App. 337. The criticism leveled at instruction No. 4 is predicated on Cohen v. Weinstein, 231 Ill. App. 84, where instruction No. 22 told the jury that "if they believed from the evidence that the collision was the result of a mere accident, they should find appellee [defendant] not guilty." Instruction No. 4 in the case at bar, which advised the jury "that the fact that an accident occurred and that the plaintiff

was injured, of itself raises no presumption of negligence or liability on the part of defendant for such injury," is not subject to the criticism leveled at instruction No. 22 in the Cohen case.

By instruction No. 7 the jury were charged "that the defendant was not required to foresee or provide against every possible condition, danger or accident that might occur, but he was only required, under the law, to exercise ordinary care." This instruction must be considered in connection with plaintiff's given instruction No. 5 wherein the jury were told that "at and just prior to the time of the happening of the collision in question, it was the duty of the defendant, Thomas Viviano, to exercise such a degree of care and caution in the operation of his automobile on the public highway in question, as a reasonably prudent person would have exercised under the same or similar circumstances that surrounded him just before and at the time of the happening of the collision in question." Taken together, these two instructions constituted a correct statement of the law.

The case was fairly tried. The weight of the evidence and the credibility of the witnesses were matters which clearly had to be submitted to the jury for decision. Accordingly, the judgment should be affirmed, and it is so ordered.

Judgment affirmed.

Seanlan, J., concurs.
Schwartz, J., took no part in the consideration or decision of this case.

44840

VALERIA BOTWINSKI,

Appellee,

v.

DROVERS TRUST AND SAVINGS
BANK, a State Banking
Corporation,

Appellant.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

339 L.A. 550²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

The plaintiff, Valeria Botwinski, brought suit against the Drovers Trust and Savings Bank for wrongfully cashing a \$30,000.00 cashier's check with a forged endorsement. Trial by jury resulted in a verdict assessing plaintiff's damages in the sum of \$31,987.50. Motions for judgment notwithstanding the verdict and for a new trial were overruled, and judgment was entered on the verdict. Defendant appeals.

Pending the appeal, plaintiff made a motion to strike the report of proceedings upon the ground that no application had been made for an extension of time to file the report within 50 days after the filing of the notice of appeal, as is required under rule 36 (1) (c) of the Supreme Court of Illinois. We allowed the motion, and the report of proceedings was stricken on June 21, 1949. Consequently, the evidence adduced upon the trial is not before us, and the appeal must be resolved upon the common-law record.

The amended complaint alleged in substance that plaintiff purchased a \$30,000 cashier's check from the defendant bank which was payable to her order; that at the time of the purchase thereof and at all times since,

44840

VALERIA BOTWINSKI,)	
Appellee,)	
	)	APPEAL FROM SUPERIOR
v.)	
)	
DROVERS TRUST AND SAVINGS)	COURT OF COOK COUNTY.
BANK, a State Banking)	
Corporation,)	
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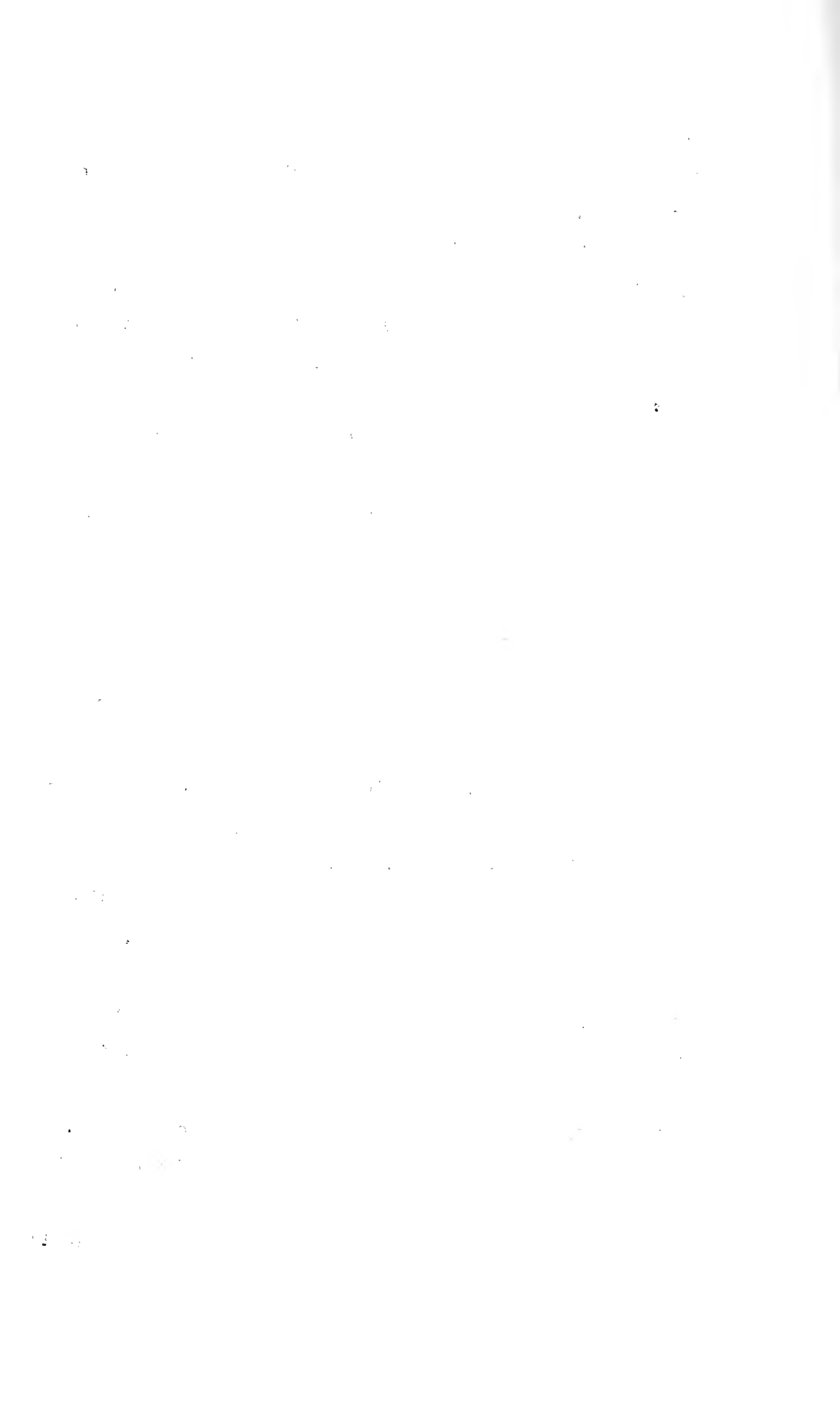
she was and is the owner of said check, and was and is entitled to the proceeds thereof; that one Lillian Beutler forged the signature and endorsement of plaintiff on the check and requested the defendant bank to transfer all the proceeds to her; that pursuant to said request the bank wrongfully paid to said Lillian Beutler the sum of \$30,000.00; that plaintiff did not then or thereafter at any time receive the proceeds of said check or any portion thereof; and that immediately upon discovery by plaintiff of the forging of her signature on or about October 1, 1947 she demanded the return by defendant to her of said sum of \$30,000.00, but that defendant refused and still refuses to pay the said sum.

The amended complaint was filed on December 23, 1947. The abstract shows that on January 12, 1948, defendant made a motion to strike the amended complaint, but no grounds or reasons in support of the motion are abstracted, nor does the abstract show the court's ruling on the motion. It appears, however, that on January 29, 1948, plaintiff filed a bill of particulars, and it is urged on behalf of defendant that the filing of a bill of particulars by plaintiff indicates that the court must have ruled on the motion to strike. This contention is purely conjectural, however.

The verdict of the jury was returned on January 28, 1949, and on the same day the court entered judgment thereon. Following its motions for a new trial and for judgment notwithstanding the verdict, both of which, as previously noted, were overruled, defendant made a motion in arrest

of judgment, but the abstract does not show any ruling on that motion.


The well recognized methods for challenging the sufficiency of a complaint are notions (1) to strike, and (2) in arrest of judgment. In the absence of any evidence upon which to consider this appeal, defendant's sole ground for reversal now rests on the contention that the amended complaint failed to state a cause of action and should have been stricken. But since neither the grounds for the notions nor the court's rulings thereon are abstracted, the determination of the sufficiency of the complaint is not properly before us. In Davis v. Home Insurance Co., 233 Ill. App. 566, the court held that "The abstract is a pleading of the party filing the same, and whatever is sought to be reviewed on the record must be sufficiently set forth in the abstract to enable the court to consider the same." (Citing several cases.) Like pronouncements were made in Deterding v. Central Illinois Public Service Co., 223 Ill. App. 374, wherein the court held that a judgment will not be reversed unless a judgment is shown, and in Goodrich v. Sprague, 376 Ill. 80, where, passing upon the question whether the Appellate Court had jurisdiction to pass upon a motion for a new trial without a previous ruling by the trial court, it was held to be "the office of Appellate Court * * * to review rulings, orders, or judgments of the court below, contained in the record, and matters not ruled upon by the inferior court are not subject to the consideration of the Appellate Court unless the lower court's failure to rule is



made the subject of an assignment of error, in which case the propriety of such failure is the question presented to the Appellate Court and not the merits of the matter upon which the trial court refuses to act. In other words, the Appellate Court's jurisdiction is appellate, and extends only to those matters in controversy which have been ruled upon by the trial court." We applied this rule in Jacobsen v. Cummings (Abst.), 323 Ill. App. 290.

This conclusion would seem to afford sufficient grounds for affirmance, but since defendant devotes the major portion of its brief to the argument that plaintiff's amended complaint did not state a cause of action, we are constrained to consider this question. Upon the misconception that the action is a "trespass on the case," based on negligence, it is urged that the amended complaint does not state a cause of action by reason of plaintiff's failure to allege that she was not guilty of contributory negligence in her dealings with the bank. The cause of action set out in the amended complaint is based primarily on conversion, and since the authorities are generally to the effect that the doctrine of contributory negligence does not apply to suits brought by holders of negotiable paper against other parties thereto, due care was not a necessary allegation. In Crahe v. Mercantile Savings Bank, 295 Ill. 375, a check was drawn on the defendant bank payable to plaintiff and her attorney, J. Marion Miller. Miller forged plaintiff's name to the check and deposited it in his bank, and the defendant bank later paid the check. The bank interposed the defense that plaintiff was estopped from recovering

because plaintiff acted negligently in her transactions with Miller, but the court held that "where there is no legal duty to exercise care there is no negligence in law," citing Wizard Oil Co. v. U. S. Express Co., 265 Ill. 156, and also quoting from Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516, 51 N. E. 9, as follows: "'The doctrine of contributory negligence as a defense to actions of tort is now of most frequent application, but we have been referred to no instance in which it has been held applicable to actions upon commercial paper, or even when the holder of such paper sues in tort for its conversion one who has innocently taken it upon a forged indorsement. Nothing could more completely unsettle commercial dealings than to extend that doctrine to suits brought by holders of negotiable paper against other parties thereto. * * * We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly, without collusion.'" Gustin v. Bacon Mfg. Co. v. First National Bank, 224 Ill. App. 457, and Wizard Oil Co. v. United States Express Co., supra, are to the same effect. Cases cited by defendant, involving actions for the recovery of damages due to negligence in inflicting personal injuries, are of course, not applicable to the facts in the instant case. We hold that freedom from negligence was not a necessary allegation in the amended complaint



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charging the issuing bank with wrongfully cashing the check upon the payee's forged signature. ✓

Other points are raised by defendant, but in the view we take it will be unnecessary to discuss them. For the reasons indicated, the judgment of the Superior Court is affirmed.

Judgment affirmed.

Scanlan, J., concurs.
Schwartz, J., took no part in the consideration or decision of this case.

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